(21,057.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 95.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK OF TRENTON, MISSOURI, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 20, 1909.

a UNITED STATES OF AMERICA, *ss:*

To The Farmers & Merchants Bank, The First National Bank of Trenton, Missouri, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Missouri, wherein Robert Earl Kerfoot is plaintiff- in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand nine hundred and eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

TRENTON, MISSOURI, *February* 21, 1908.

I, one of the attorneys of record for the defendants in error in the within described case, hereby acknowledge due service of the within citation and enter an appearance in the Supreme Court of the United States.

EDGAR M. HARBER,
One of the Attorneys for Defendants in Error.

[Endorsed:] Filed Mar- 2, 1908. Jno. R. Green, Clerk.

b EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

Duncan D. Lyon, being duly sworn deposes and says, that on the 26th day of February, A. D. 1908, he served the within citation on Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot and Mona Kerfoot, within named, at Ann Arbor in said District, by delivering to each personally, a copy thereof.

DUNCAN D. LYON.

Subscribed and sworn to before me, this 27th day of February A. D. 1908.

[Seal Carrie Davison, United States Commissioner, Eastern Dist. of Michigan.]

CARRIE DAVISON,
United States Commissioner in and for said District.

c UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Homer Hall, Administrator of the estate of J. H. Kerfoot, deceased, and Robert Earl Kerfoot, by his next friend, Homer Hall, Appellants, and The Farmers & Merchants Bank, The First National Bank of Trenton, Missouri, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United
d States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Robert Earl Kerfoot as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of February, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Feb. 21, 1908. Jno. R. Green, Clerk.

1 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to-wit, on the 17th day of September, 1896, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, a certified copy of the judgment and order granting appeal in a certain cause wherein Homer Hall, administrator of the estate of James H. Kerfoot deceased and Robert Earl Kerfoot who sues by Homer Hall, his next friend were appellants and The Farmers and Merchants Bank of Trenton, Missouri, et al were respondents, which said certified copy of judgment and order granting an appeal is in words and figures as follows, viz.:

STATE OF MISSOURI,
County of Grundy, ss:

August Term, 1895.

In the Circuit Court of said county, on the 22nd day of August, 1895, the following, among other proceedings, were had, viz.:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased, and Robert Earl Kerfoot, who Sues by Homer Hall, his next friend, Plaintiffs,

against

THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI, THE First National Bank of Trenton, Missouri, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, and Mona Kerfoot, Defendants.

This cause coming on to be heard both plaintiffs and defendants answering ready for trial, and jury being waived, the cause is submitted to the court, who after hearing the evidence and argument of counsel, and being fully advised, doth find the issue for the defendants. It is therefore ordered considered and adjudged by the court, that the plaintiffs take nothing by their suit, but that defendants go hence without day, and recover of plaintiffs their costs in this cause expended, taxed at ($——). and that they have execution therefor.

And on the same day the following further record was made in said cause to-wit:

2 HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased *et* al., Plaintiffs,

against

THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI, et al., Defendants.

Plaintiffs file affidavit *in* appeal which was considered by the court, and appeal granted to the Supreme Court of Missouri, and appeal bond fixed by the court in the sum of Two Hundred Dollars. And plaintiff has ten days after the adjournment of this term of court to file bond, and until and during the next term of this court

to file their Bill of Exceptions, and the one Bill of Exceptions are to be used in both cases.

And afterwards on the 20th day of December, 1895, it being the fifth day of the said December term, 1895, of said court, the following further record was made in said cause to-wit:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased et al., Plaintiffs,
against
THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI, et al., Defendants.

By agreement the time for filing the Bill of Exceptions in this cause is extended until and during the first week of the April term, 1896 of this court.

And afterwards on the 25th day of April 1896 and during the first week of the said April term of said court, the following further record was made in said cause to-wit:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased et al., Plaintiffs,
against
THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI, et al., Defendants.

By agreement the time for filing the Bill of Exceptions in this cause is extended, to thirty days from the adjournment of this term of court.

3 And afterwards in vacation, May 23rd, 1896, and within thirty days from the adjournment of the said April term of said court the following further record was made in said cause to-wit:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased et al., Plaintiffs,
against
THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI, et al., Defendants.

Plaintiffs file their Bill of Exceptions, which is signed and sealed by the Judge of this court, and made a part of the record in this cause.

STATE OF MISSOURI,
County of Grundy, ss:

I, A. U. Spickard, Clerk of the Circuit Court, in and for said county, hereby certify the above and foregoing to be a true copy of the proceedings of our said Circuit Court, on the days and years above written, as the same appears on the records in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Trenton, this the 16th day of July, 1896.

[SEAL.] A. U. SPICKARD.

Filed September 17, 1896.

JNO. R. GREEN, *Clerk.*

And afterwards to-wit, on the 18th day of March, 1898, the said appellants filed their printed abstract of record in said cause, which said abstract is in words and figures as follows, viz.:

In the Supreme Court of Missouri, Division No. —, October Term, 1897.

No. 8191.

HOMER HALL, Adm'r of Estate of J. H. Kerfoot, Deceased, and ROBERT EARL KERFOOT, by Next Friend, Homer Hall, Plaintiffs,

vs.

4 THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL Bank, of Trenton, Mo., Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Defendants.

Appeal from Circuit Court of Grundy County.

Hon. Paris C. Stepp, Judge.

Millard Patterson and Geo. Hall & Son, Attorneys for Appellants.
Thomas J. Beall and Harber & Knight, Attorneys for Respondent.

APPELLANTS' ABSTRACT OF RECORD.

On November 6, 1894, plaintiffs filed their petition as follows:

Petition.

Plaintiffs state that Robert Earl Kerfoot, who sues by his next friend, Homer Hall, is the grandson and the only heir at law of James H. Kerfoot, deceased, and the only child and heir at law of Robert H. Kerfoot, deceased, who was a son of said James H. Kerfoot.

That James H. Kerfoot, deceased, died at El Paso, Texas, on the — day of February, 1894, owning property and effects in Grundy county, Missouri.

That on the — day of March, 1894, plaintiff, Homer Hall, was duly appointed and qualified as administrator of the estate of said James H. Kerfoot, deceased, by the Probate Court of Grundy county, Missouri.

That the Farmers and Merchants Bank, of Trenton, Missouri, defendant, is a banking corporation duly incorporated under the laws of the State of Missouri.

That the First National Bank, of Trenton, Missouri, defendant, is a banking corporation duly organized and incorporated under the laws of the United States of America.

That on and prior to the 28th day of October, 1891, said James H. Kerfoot owned and had in his possession the following described real estate in Grundy county, Missouri, to-wit: Part of lot
5 six, block twenty-nine, in the town (now city) of Trenton, commencing at the northeast corner of said lot, running thence southwesterly along the northwest side of Water street thirty-nine(39) feet, thence northwest at a right angle with Water street to Border street, thence east along the south line of Border street to the place of beginning.

That on the 28th day of October, 1891, said James H. Kerfoot, by his warranty deed of said date, attempted to convey to the defendant, The First National Bank, of Trenton, Missouri, said real estate above described. Which deed was filed in the office of the Recorder of Deeds of Grundy county, Missouri, on the 2nd day of December, 1893, and was recorded in said office in Book 48, at page 265.

That Charles H. Cook, as the Vice-President of said defendant, The First National Bank of Trenton, Missouri, and on behalf of said defendant bank, on the 9th day of October, 1893, attempted to execute a quit claim deed of said date to defendants, Hervey Kerfoot, Alwilda Kerfoot, and Lester R. Kerfoot to said real estate. Which deed was filed for record in the office of the Recorder of Deeds of Grundy county, Missouri, on the 20th day of February, 1894, and recorded in said office in Record Book 35, at page 414.

That while said deed from said James H. Kerfoot to defendant, The First National Bank, of Trenton, Missouri, appears on its face to be an absolute conveyance of said real estate from said Kerfoot to said bank, in truth and fact it was an attempted conveyance by said Kerfoot to said defendant bank, in trust for the use, benefit and disposal of said Kerfoot and was so understood by said parties at the time, and while the same was held and occupied by said defendant bank, it was held and occupied by it during all of said time and until the death of said Kerfoot, as the tenant of said Kerfoot and under a written lease with said Kerfoot at an agreed monthly rental of sixty dollars per month, which was paid regularly each month by said defendant bank to said Kerfoot.

6 That said defendant, The First National Bank, of Trenton, Missouri, was and is, as such banking corporation, incapable of receiving, owning, holding, or disposing of, said real estate for the use and purposes aforesaid, under and by virtue of the provisions of its charter. And whatever interest or right it acquired, if it acquired any, under and by virtue of said pretended deed from said James H. Kerfoot, deceased, to it, was received, acquired and held by it in trust for the use and benefit of said James H. Kerfoot, deceased, his heirs and assigns.

That said pretended deed made by said Charles H. Cook, as the Vice-President of said defendant, The First National Bank, of Trenton, Missouri, and on behalf of said defendant bank, as aforesaid, was made, executed and delivered without any authority from the Board of Directors or other proper officers of said bank, and is illegal and void.

That said pretended deeds from said James H. Kerfoot to said defendant bank and from said defendant bank to said defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, were not delivered during the lifetime of said James H. Kerfoot, deceased.

That defendant, The Farmers and Merchants Bank, of Trenton, Missouri, is now in possession of said real estate, claiming under its said co-defendants.

That this plaintiff, Robert Earl Kerfoot, as the grandson and only heir at law of the said James H. Kerfoot, deceased, is lawfully entitled to the possession of said real estate and the rents and profits thereof.

That the said deeds from said James H. Kerfoot, deceased, to said First National Bank, of Trenton, Missouri, defendant and from said Charles H. Cook, Vice-Presdent of said bank and on behalf of said bank to defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, constitute a claim or color of title in said defendants and a cloud upon the plaintiff, Robert Earl Kerfoot's, title to said real estate.

7 That defendants, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot and Mona Kerfoot, are all non-residents of the State of Missouri.

That defendants Thomas J. Beall and Mona Kerfoot are claiming some title to the above described property adverse to plaintiffs, the nature and character of which title are unknown to plaintiffs.

That said real estate has a brick business house erected thereon and is being used and occupied by tenants and that the value of said property consists largely in the moneys which may be received for the use and rent thereof.

That said James H. Kerfoot, deceased, owed and was indebted to The First National Bank, of Trenton, Missouri, defendant, in the sum of five hundred dollars and interest thereon, at the time of his death, and left no property or effects in this State subject, or that could be subjected, to the payment of said indebtedness except the property above described.

That should the said deeds from said Kerfoot to said First National Bank, defendant, and from said defendant bank to defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot be adjudged and held void by the courts, then said real estate and the rents thereof will become subject to the payment of said indebtedness in the hands of the plaintiff, Homer Hall, as such administrator as aforesaid.

That, owing to the various conflicting interests and the uncertainty of the title to said real estate, this suit to settle and determine the true ownership and title thereof will probably continue a long time and it is to the interest of all parties concerned that said property should be cared for, rented, the rents collected, the taxes, insurance

and repairs paid and the surplus held to await the result of this suit for the benefit of the rightful owner.

Plaintiffs therefore pray the court to make an order appointing a receiver to take charge of, rent, manage and control said property,
collect the rents, pay the taxes and insurance thereon, and
8 keep and hold the net earnings of said property, after paying said taxes, insurance and repairs, to await the results of said suit.

And plaintiffs further pray the court to render judgment and decree of record, adjudging and decreeing that said deeds and each of them be cancelled and held for naught and all right, title and interest of said defendants or either of them in said real estate be vested in the plaintiffs, Robert Earl Kerfoot and Homer Hall; and for all other proper relief.

Plaintiffs, for another and further cause of action, state, that on the — day of February, 1894, they were entitled to the possession of the following described premises situate in Grundy county, Missouri, to-wit: Part of lot six, block twenty-nine, in the town, now city, of Trenton, commencing at the northeast corner of said lot, running thence southwest along the northwest side of Water street thirty-nine feet, thence northwest at a right angle with Water street, to Border street, thence east along the south line of Border street to the place of beginning; and being so entitled to the possession thereof, that the defendants afterward, on the — day of February, 1894, entered into such premises, and unlawfully withhold from plaintiffs the possession thereof, to their damage in the sum of one thousand dollars. They further aver that the monthly value of the rents and profits of the premises is one hundred dollars. That defendants, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot and Mona Kerfoot are non-residents of this State. Wherefore plaintiffs ask judgment for the recovery of the premises and one thousand dollars damages for the unlawfully withholding of the same from plaintiffs, and one hundred dollars for monthly rents and profits from the rendition of judgment and until the possession of the premises is delivered to plaintiffs, and for all other proper relief.

On February 13th, 1895, defendants, The Farmers and Merchants Bank, The First National Bank, Thomas J. Beall, and Mona Kerfoot filed their separate answer as follows:

9 *Answer.*

Comes now the defendants, Farmers and Merchants Bank, First National Bank, Thomas J. Beall and Mona Kerfoot, and for their answer to plaintiff's petition, and each count thereof, say that they deny each and every of the allegations and statements therein made and contained, except they admit defendant banks are incorporated, as therein stated.

That James H. Kerfoot departed this life at El Paso, in the State of Texas, on the — day of February, 1894, and that on and prior

to the 28th day of October, 1891, he owned and had possession of property described in plaintiff's petition.

Having fully answered, defendants ask to be discharged with costs.

On February 13th, 1895, defendants Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, by James H. Patton, their legal guardian, filed their separate answer, as follows:

Comes now James H. Patton, and as the curator of Hervey, Lester R. and Alwilda Kerfoot, enters his voluntary appearance herein, and as such curator, for answer to plaintiff's petition, and each count thereof, says that he denies each and every allegation therein stated except such as are hereinafter specifically admitted.

This said curator further answering for the said Hervey, Lester R. and Alwilda Kerfoot, says that on the — day of January, 1895, he was duly appointed by the probate court of Grundy county, Missouri, curator of the property of said Hervey, Lester R. and Alwilda Kerfoot, that thereafter he duly qualified and gave bond as such curator, and since said time has been and now is acting as such, that as such curator he, since said time, has and now has possession, management and control of the property mentioned in plaintiff's petition, with other property in said Grundy county, the same being, and long prior to the institution of this suit, and at all times since having been and now being the property of the said Hervey, Lester R. and Alwilda.

10 Said curator further answering, says, that the Farmers and Merchants Bank, as well as the First National Bank, defendants, are banking corporations, duly organized and incorporated, as in plaintiff's petition stated, that it is true that on and prior to the 28th day of October, 1891, James H. Kerfoot owned and had in his possession the real estate in plaintiff's petition described. Said curator further says that on said 28th day of October, 1891, the said James H. Kerfoot, by his warranty deed of that date, conveyed to the said First National Bank, defendant herein, said real estate, which said deed was at said time duly delivered to said bank, and thereafter recorded in the recorder's office in said Grundy county, Missouri. That thereafter the said First National Bank, at the request of said James H. Kerfoot, made, executed and delivered to the said Hervey, Lester R. and Alwilda, its deed to said property, which said deed was thereafter and on the 20th day of February, duly recorded in the recorder's office of said Grundy county, Missouri.

That the said First National Bank had full power and authority to accept and receive said deed and conveyance from the said James H. Kerfoot, and to convey as requested by him, said premises to the said Hervey, Alwilda and Lester R. Kerfoot.

That in truth and in fact said conveyance of said Kerfoot to said bank, and the conveyance of said bank to said Hervey, Alwilda and Lester R. Kerfoot conveyed to and vested all the right, title and interest of the said Kerfoot, as well as of the said bank, in and to the said Hervey, Alwilda and Lester R. Kerfoot. That the said James H. Kerfoot, as well as these plaintiffs, would be and are estopped from

and cannot in either law or equity, be heard to deny or question the right of said bank to receive from said Kerfoot or make to the said Hervey, Alwilda and Lester R. the conveyances aforesaid.

Said curator, further answering, admits that said James H. Kerfoot departed this life at El Paso, Texas, on the — day of
11 February, 1894, and that the said Hervey, Alwilda and Lester R. Kerfoot, each of whom are children and heirs of the said James H. Kerfoot, was at the time of the commencement of this suit, and at all times have been and now are residents of El Paso, Texas.

Said curator, as such and for the said Hervey, Alwilda and Lester R. Kerfoot, having fully answered, asks that he and they be discharged, with their costs.

Plaintiff read in evidence, deposition of LAURA S. CLAUDY as follows:

My name is Laura S. Claudy, age 50 years, residence, Topeka, Kansas. Mrs. Alice B. Wells, now of Raymond, Kansas, is my oldest daughter. I was well acquainted with Robert H. Kerfoot, now deceased. I got acquainted with him in 1883. He came to our house and rented a room from me. He married my daughter, Alice B. Wells, November 27th, 1885. Rev. B. F. McKirahan performed the marriage ceremony. They resided from the time of their marriage until the death of Robert H. Kerfoot, with me in Topeka, Kansas. There was born of said marriage one child, Robert Earl Kerfoot. He named him Earnest; she did not like the name, and changed it to Earl and put the Robert to it after the father's death. This child, Robert Earl, was born at 5th and Quincy streets, at a room they had taken in my house on the 6th day of May, 1886. Robert H. Kerfoot and his wife Alice lived together after the birth of the child Robert Earl, six months, at my house. Robert Earl was seven months old at the time of his father's death. The father died the day before thanksgiving in 1886. Robert H. Kerfoot always regarded Robert Earl as his child and said he was his child and favored him; he always treated him well and always gave her, the mother, plenty of money for anything she needed and also paid the doctor's bill and me for taking care of her in confinement. Mrs. Sherman attended her in confinement and no one else was present
12 but myself. Mrs. Sherman was a practicing physician and is now a resident of Wisconsin. Robert H. Kerfoot came from Denver and stopped with us in 1883. He claimed his home was in Trenton, Missouri. I have his photograph and now present it to the notary to be attached to my deposition and marked Exhibit A.

Cross-examination:

Mrs. Wells' maiden name was Claudy. She is my daughter by my present husband. She has always lived with me. He had his photograph taken just two months before his death and gave them away to his friends except me. I went to the photographer's and had one copied from the negative. Mr. Kerfoot had brought some horses to

Topeka from Denver, at the time of his first visit to our house. He met my daughter when he first came to engage the room in 1883. I am housekeeper for my family, no one else; have lived in Topeka since 1887; came from Wilson, Elsworth county, Kansas. Resided there four years. As far as I know, Mr. Kerfoot was in Kentucky the month before his death. He went to see about getting some horses. Can't tell when I got the photograph, it may have been the next year after his death. My daughter had been married onece prior to November, 1885, to Charles Shade, in Bloomington, Illinois. She had been divorced from Shade about four years before her marriage to Robert H. Kerfoot. I never knew her to have any company or have anything to do with any other man after she separated from Shade until she commenced to keep company with Mr. Kerfoot. Mr. Shade lived in the same town in Illinois where they were married. Mrs. Wells had one little boy named Claud, by her marriage with Shade and he died when he was three years and eleven months old. We resided in Wilson, Kansas, at the time of my daughter's marriage with Shade. My daughter went to Bloomington, Illinois, and was married there. She went alone. I had met Mr. Shade before, he had visited her at Shippensburg, Pa. We moved to Topeka in '81 and our daughter came with us.

Deposition of M. F. McKirahan, who testified:

My name is M. F. McKirahan. Am a minister of the gospel, age forty-eight years, and reside at Topeka, Kansas. I was called
13 upon on the 27th day of November, 1885, at my residence, 410 West 5th street, by Robert H. Kerfoot and Alice Shade for the purpose of performing a marriage ceremony between them. They presented to me a marriage license authorizing me to join them in marriage, signed by D. A. Harvey, probate judge. I performed the ceremony, made return thereof in due form, at the office of the probate judge, in Shawnee county, Kansas, for the license. I recognize the instrument here shown me as a true copy of the marriage license, with my return thereon. (At the request of the witness, I, the Notary, make said copy a part of this deposition and mark it exhibit B.) I also made a record of the marriage ceremony and have it here, which is as follows: "Date Nov. 27th, 1885. At prayer meeting. Called home to marry Mr. Robert H. Kerfoot and Miss Alice Shade.

Marriage license and marriage certificate attached to deposition were read in evidence as follows:

State of Kansas,
County of Shawnee, ss:

November 27th, A. D. 1885.

To any person authorized by law to perform the marriage ceremony, Greeting:

You are hereby authorized to join in marriage Robert H. Kerfoot, of Nashville, Tennessee, age 28 years, and Alice Shade, of

Shawnee county, Kansas, age 26 years, and of this license you will make due return to my office within thirty days.

D. A. HARVEY,
Probate Judge.

(Seal of Probate Court, Shawnee county, Kansas, affixed.)

Certificate of Marriage.

STATE OF KANSAS,
County of Shawnee, ss:

I, the undersigned, a minister of the gospel of said county, do hereby certify that in accordance with the authorization of within license, I did, on the 27th day of November, A. D. 1885, at Topeka, in said county, join and unite in marriage the within named Robert H. Kerfoot and Alice Shade.

14 Witness my hand the day and year above written.

M. F. McKIRAHAN,
Official Title, Minister."

Plaintiffs read in evidence a certificate copy of a decree of the circuit Court of McLain county, State of Illinois.

Plaintiff then read in evidence a deed from James H. Kerfoot to the First National Bank, of Trenton, Missouri, dated October 28, 1891, consideration $1,400, conveying the property in dispute, with the usual covenants of seizin, warranty, etc. Acknowledged October 28th, 1891, before James G. Young, Notary Public of Jackson county, Missouri, certificate of acknowledgment being in due form, and reciting that the grantee "declared himself to be single and unmarried." Filed for record December 2d, 1893.

Plaintiffs read in evidence a quit claim deed, as follows:

This indenture, made on the ninth day of October, A. D., one thousand eight hundred and ninety-three, by and between First National Bank of Trenton, of the County of Grundy and State of Missouri, party of the first part, and Hervey, Alwilda, and Lester R. Kerfoot, of the County of ——, in the State of ——, parties of the second part:

Witnesseth: That the said party of the first part, in consideration of the sum of fourteen hundred dollars, to it paid by the said parties of the second part, the receipt of which is hereby acknowledged, do by these presents, remise, release and forever quit-claim unto the parties of the second part, the following described lots, tracts or parcels of land, lying, being and situate in the County of Grundy and State of Missouri, to-wit: All of a strip of land nineteen (19) feet wide off of the whole length of southwest side of that part of lot six (6) of block twenty-nine (29) in the Town of Trenton, described as follows: Commencing at the northeast corner of said lot number six (6), thence southwesterly along the northwest side of Water

15 street fifty-nine (59) feet, thence northwesterly at a right angle with Water street to Border street, thence along the

south line of Border street to the place of beginning. The portion of said lot herein conveyed being the same premises conveyed by Americus I. Lord to David Lord by deed dated September 20th, 1877, and recorded in the Recorder's office of said county, in deed book number eight (8), at page twenty-six (26). This deed is intended to convey all the title acquired by said David Lord from said Americus I. Lord to the premises in said last named deed described. Also a strip of land seven (7) feet and two (2) inches wide, extending into said Border street as formerly laid out but which has been decided by the courts in favor of James H. Kerfoot to be his land but is not included in said description.

To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said parties of the second part, and their heirs and assigns forever; so that neither the said party of the first part, nor its heirs, nor any other person or persons, for it or in its name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every of them shall by these presents be excluded and forever barred.

In Witness Whereof, the said party of the first part has hereunto set its hand and seal, the day and year first above written.

[BANK SEAL.] THE FIRST NATIONAL BANK [SEAL.]
OF TRENTON, MISSOURI.
By C. H. COOK, *Vice-President.*

Attest:
R. M. COOK, *Cashier.*

The certificate of acknowledgment to said deed is as follows:

STATE OF MISSOURI,
County of Grundy, ss:

On this the 9th day of November, 1893, before me personally appeared Chas. H. Cook, Vice-President of the First National Bank of Trenton, Missouri, to me known to be the person described
16 in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed. And the said —— —— further declare —— —— to be single and unmarried.

My term expires Dec. 26, 1894.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at my office in said county the day and year first above written.

[SEAL.] A. H. BURKEHOLDER,
Notary Public qitn*in and for Grundy Co., Mo.*

Said deed was filed for record in the office of the recorder of deeds of Grundy county, Missouri, February 20th, 1894, and recorded in book 31 at page 474.

R. M. Cook, being sworn, testified as follows:

I am cashier of the Trenton National Bank of this city. I recognize the deed shown me, this is the deed from James H. Kerfoot to the Trenton National Bank. It was received about the last of October or first of November, 1893. I at that time was the cashier of the First National Bank of this city. The deed was sent to us by Dr. Kerfoot, through the mail. It was accompanied by a letter. I have the letter, which I now produce. The letter and deed were both enclosed in the same envelope, directed to me personally. The correspondence was most always that way. I was acquainted with James H. Kerfoot, the grantor. I have known him for years. He was living in Trenton when I first got acquainted with him. Was not acquainted with Robert H. Kerfoot, his son. I used to know the boys but did not know them apart. I didn't know the boys after they were grown. Dr. James H. Kerfoot was married and had a family at the time I first got acquainted with him here in Trenton. I could not tell just when his first wife died. I was living in Lindley at that time. I remember the occurrence, or hearing of the death of the first wife. I don't know about Robert H. Kerfoot's death or about his taking his own life here in Trenton. I
17 heard of the circumstances. I don't remember how long it was after I heard of the death of the first wife here in Trenton until I heard of the death of the son, Robert H.

I had a conversation with Dr. Kerfoot in regard to the delivery of this deed to the bank and the bank making the quit claim deed, along in September, 1893, just a few moments in the bank. He said he wanted to deed that property to the bank and the bank to make him a quit claim deed back, and such as that, and if we had no objections he would make the deeds and send them to us. That was about all the conversation. This is merely in substance, it is not just the words that I remember that he first said to me personally that evening.

The reason he assigned for making the deed to the bank and the bank quit claiming back was he just thought I could handle the property better or the bank could handle the property better and the assessments would be lower, and such as that. And that is about the only reason he gave for it. He seemed to be desirous that the matter be kept quiet as to making the quit claim deed and did not want any action of the board of directors of the bank in the matter, and wanted to know if father and I, father as vice-president and myself as cashier, could execute the quit claim deed. Judge Peery was not present at the time. Mr. Cullers was not present. The board of directors of the bank did not have anything to do with the making of this deed in any manner, or give any orders or directions about it, that is, the quit claim signed by my father, C. H. Cook, the vice-president. The matter was never brought before the board of directors at all.

Mr. C. H. Cullers was the president of the First National Bank of Trenton, Missouri, at the time of the execution of this quit claim deed. Mr. Cullers resides in Harrison township, Grundy county. He resided there at the time he was chosen as president of the bank.

He lived at the same place during all the time he was discharging the duties of the office of president of The First National Bank. I suppose he was at home at that place at the time of the execution of this deed by my father, I don't know. The First National Bank of Trenton, Missouri, was occupying this property in contro-
18 versy at the time of the execution of these deeds as tenant of Dr. Kerfoot, and The First National Bank continued to occupy that building after the execution of the deed by my father, as tenant the same as before and continued to pay rent to Dr. Kerfoot after the execution of this quit claim deed signed by my father. After the date of the delivery and the execution of this quit claim deed until the death of Dr. Kerfoot, the First National Bank of Trenton accounted to Dr. Kerfoot for the rent and the management and government of the property in controversy.

Our rent was $65 a month payable in advance, and we would credit his account on the first day of each month with that amount. Dr. Kerfoot claimed the ownership and management and control of the property in controversy, from the making of this quit claim deed up until the date of his death, and received all rents therefor. After the making of the quit claim deed until the date of his death I paid the taxes on the property and charged them up to his account, and the reason was, from the fall of 1890 up until the time of his death, I attended to those matters for him, usually; got his tax bills and receipts and sent them to him. He would register them there and send them back to me and have me go and pay them. That was usual. Sometimes he would send his check, sometimes I would just charge them to his account, his check on First National Bank. I attended to the insurance on the property through his instructions as his agent. There was no change in the relationship between Dr. Kerfoot and the First National Bank in reference to the occupancy or management of the property after the making of these deeds, whatever, from the prior arrangement and occupancy. After the making of the quit claim deed in controversy I sent it to Dr. Kerfoot by mail to El Paso, Texas.

Q. What instructions or directions if any did you or the First National Bank or its officers, get in regard to the delivery of this quit claim deed?

A. We got no instructions at all. I don't remember. No doubt I received several letters from Dr. Kerfoot after I sent the quit claim deed about the management of the property. I am
19 satisfied we have some letters. We mailed the quit claim deed in November, 1893, and he died in February, 1894. He had several letters between these times. I think I can produce these letters.

The Farmers and Merchants Bank, the defendant, are in possession of this property in controversy. The reasonable rental value of the property since Feb. 4, 1894, up to date, is about $45 a month, and the reasonable rental value of property occupied by the defendant Nichols in the other building is about $40 a month. Mr. Nichols has been in possession of that part of the property occupied by him in the suit against him and us since Feb. 4th, 1894, up to the pres-

ent time. The First National Bank ceased to occupy that part of the property involved in the suit against the First National Bank and others about September 1st, 1894. The property in dispute was reinsured after the making of this quit claim deed in the name of the First National Bank.

Q. I'll ask you what authority if any did your father, C. H. Cook, have from the board of directors of the First National Bank of Trenton, Missouri, to make this deed, the quit claim deed, to these defendants?

A. Well, the matter was never brought before the board at all. Of course our by-laws provide that the vice-president may act in the absence of the president but then only by the order of the board.

[The witness here produced and identified letters from Dr. James H. Kerfoot which were marked by the stenographer as exhibits, and read in evidence.]

So far as I know these are all the letters in my possession from Dr. Kerfoot relating to this property matter dispute. There was no money paid to Dr. Kerfoot for the conveyance of this property from him. There was no money or consideration received for the conveyance from the bank of the quit claim deed to the defendants, Hervey, Alwilda, and Lester R. Kerfoot. I found a lease from Dr. Kerfoot to the bank for the property in dispute, which I have. I see now it was a lease given by J. H. Kerfoot to Charles E. Ford, and an additional agreement between Dr. Kerfoot and the First National Bank. Charles E. Ford was the first cashier of the First National Bank, and received the lease and assigned it to the bank. I succeeded Mr. Ford as cashier of the bank. One of the letters produced and identified makes mention of the Mr. Colliers; they occupy a part of the basement of the building for a barber shop. One of them is still occupying the basement as tenant. I received a letter from Dr. Kerfoot in relation to this property about January 1st, 1894. The 22nd day of December, I believe it was, I think I received a letter about the 1st day of January, 1894, which contained some statement about the bank going into liquidation, but I am not able to find the letter. The lease from Dr. J. H. Kerfoot to C. E. Ford and assigned by Mr. Ford to the First National Bank expired Sept. 1st, 1894, dated Kansas City, Missouri, 6th day of December, 1888. The bank continued to occupy the property until about August 1st, 1894, under this lease. [Which lease was produced and read in evidence.]

Cross-examination:

The quit claim deed bearing the date of October 9th, 1893, signed by the First National Bank of Trenton, Missouri, by C. H. Cook, was made in pursuance of the request of Dr. Kerfoot, contained in this letter of Oct. 26th, 1893, and previous letters thereto, and was sent to him. From that time I never had possession of this quit claim deed. The warranty was made and delivered through the mail to us and was retained from that time to the present. The warranty deed was made in pursuance of directions of Dr. Kerfoot's.

I don't know of any others at all. The warranty deed and the quit claim deed were both enclosed in an envelope with the letter just mentioned. Was never requested by Dr. Kerfoot at any other time to make any other deed or conveyance.

Q. Your vice-president acts in the place of the president if the president is absent?

Plaintiff objects for the reason that as is shown by a former statement of the witness the by-laws of the bank are written and
21 are the best and only competent evidence.

Which objection was overruled by the court, to which ruling plaintiff excepted at the time.

A. In the absence of the president the vice-president acts in his stead. At the time of the making of this deed Mr. Cullers was not in the city.

Redirect examination:

I do not know where Mr. Cullers was at the time of the making of this deed. I presume he was at home. Dr. James H. Kerfoot owes the Trenton National Bank, of which I am now cashier, a note of five hundred dollars. He also owes the bank an account of about one hundred dollars.

Plaintiffs then read in evidence the letters produced and identified by Mr. Cook as follows:

EL PASO, 9-23, '93.

R. M. Cook:

MY DEAR SIR: Your letter received, contents noted. Please accept thanks for your kind offer to accommodate me as per request. I shall send you the deed within a few days with full instructions. No one need know but the bank is really owner of the building. Which would suit me very much.

Yours truly,

J. H. KERFOOT.

EL PASO, 9-31.

R. M. Cook:

DEAR SIR: My insurance on building expires November 7th. Have them rewritten to bank as soon as deed is received, which do as soon as deed is recorded. Which do as soon as you get my wire.

Yours,

J. H. KERFOOT.

KANSAS CITY, *Oct. 9th.*

R. M. Cook, Esq.

MY DEAR SIR: (Part not pertaining to property omitted.) With your approval I may deed your bank the building which you
22 are in, requesting you to at once put it on record. At the same time make a quit claim deed to such of my relatives as I may wish to have the property in case of my death by accident

or otherwise, holding such quit claim deed without record. If I ever should sell it I could surrender such deed to the First National Bank and have them deed as directed by me. The deed from you to my relatives would have to be signed by yourself as cashier, and president or vice-president. The record would show the property to belong to your bank, which might tend to keep assessments lower. It is now very high. If you are willing to assist me and I conclude to do so, will do so at once. I shall be here for two days.

Yours,

J. H. KERFOOT,
Kansas City, Mo.

EL PASO, 10-15, '93.

R. M. Cook.

DEAR SIR: You- letter received: contents as stated. I thank you for the accommodation. Hope you have had insurance for five thousand made payable to bank. Please have deed to bank recorded as before stated. I will not have the deed made by you recorded. In case I should wish to transfer the property, I would surrender it to you and have you make deed.

Yours,

J. H. KERFOOT.

EL PASO, 10-16.

R. M. Cook.

DEAR SIR: Enclosed please find letters from Mr. Collier? He is at his old tricks asking for repairs. Please look at the floor and have such repairs as needed. It may be best to have a portion of the floor re-laid and painted or oiled, which will be less than tiling. Treat him well but, if he fails to do right and pay rent, put him out. Put him out without ceremony if he fails to pay it up between this and December 1st. Take his note for back rent and put him out at once without any ceremony.

23 EL PASO, *Oct.* 26, 1893.

R. M. Cook, Esq.

DEAR SIR: Enclosed please find two deeds, one to the bank, the other to parties therein named. Please have the quit claim deed acknowledged by a notary public whom you can trust to be confidential. Then return said deed to me by mail in enclosed envelope. Upon receipt of said quit claim deed I will wire you.

Have my deed to First National Bank recorded and expense on me for recording. I shall not have the quit claim deed recorded at present. In case I should wish to convey the property at any time I would surrender the quit claim deed and have bank make a new one to whom I might direct. Please allow the impression to go forth that the bank is the owner.

When you record deed call on G. L. Winters and have my insurance made payable to the First National Bank. By doing as

above requested you will greatly oblige me and I can not see that it could in any way discommode the bank. If so I would not ask it.

Please have deed signed and acknowledged as soon as you get it and return at once. I believe your by-laws permit the vice-president to act in the absence of the president. And attest by yourself, as cashier with the bank seal thereon.

Yours,

J. H. KERFOOT.

EL PASO, 12-7, '93.

R. M. Cook, Esq., Trenton, Missouri.

DEAR SIR: (First part omitted.) Please notify county and city collectors that you will pay taxes to date, both on the Miller house and on the Bank building on or before January 1st, that they may not become uneasy about it. Also please ask tenant how the fence is around the place. Tell him I will have a new one built in the spring. Hope you will get rooms occupied. Would like to have Collier in one suit of them. Will give him insurance on the building. I have promised it to him but I forgot to tell you about
24 it. I would stand expense of having barber shop floor well oiled if they would be satisfied. They have always been hard to please and slow to pay their rent. Make the room rent seven dollars if it will do any good to try to get them in this month and let the rent begin January 1st.

JOHN RYAN'S deposition was read as follows:

My name is John Ryan. I live in El Paso, El Paso county, Texas. I knew Dr. James H. Kerfoot. I got acquainted with him in 1874, in Trenton, Grundy county, Mo. At that time he was running a drug store and practicing medicine. I knew him all the time he lived there; knew him in Kansas. Stayed with him one winter in Kansas. He went from Kansas to Eureka Springs, Arkansas. From Eureka Springs to Hot Springs. I was with him all the time in Arkansas. We came back from Arkansas to Kansas some seven or eight years ago. He stayed in Kansas and I went up into Missouri. He went up in the summer to his farm in Missouri, and he went to California about five years ago. I did not go with him to California at the first time. I was under his employ. Was employed by him when I first got acquainted with him. After I worked for him the first time he went out of the hotel business and I remained there a little while longer, at the hotel. He wanted me to go to work for him again. I went with him and have been working for him since 1874, except about a year. He lived in Trenton that year. I lived with him all the time he was in Arkansas. Went with him from Arkansas back to Kansas, stayed with him about a week after we got back, then went up on his farm in Missouri. Took care of his place in Kansas while he was gone to California. Yes, it was about five years ago. He went in the fall and came back the following April. I went with him to California the second time, which was over four years ago. Have lived with him ever since. He lived at El Paso, Texas, at the time of his death.

He came from Kansas City. The first time he lived in California four or five months. From October to April the second time.
25 When he left California he moved back to Kansas City, Kansas. I know the children who are defendants in this case. Don't know where Hervey was born. Don't know his age. Lester K. is about four. He was born at the corner of 4th and Jersey streets, Kansas City, Kansas. Alwilda is about eight. She was born in Kansas City, Kansas. While Dr. Kerfoot lived in Kansas City, Kansas, he went by the name of Hervey. Don't know whether he used any name besides Hervey, or not. I know the property. Lots 1, 2, 3 and 4, block 50, in Wyandotte, now Kansas City, Wyandotte county, Kansas, which Dr. Kerfoot gave me a mortgage on to secure a note for $2,000. That is the property he lived on when he went by the name of Hervey. His family lived with him there just the same as are here now. His children and his wife. I mean by the woman I call his wife, Mona Kerfoot, the defendant in this case. I do not know of my own knowledge whether she was ever married to Dr. Kerfoot or not. I first knew her in Trenton, Missouri, about ten, eleven or twelve years ago. She then went by the name of Mona to Dr. Kerfoot or not. I first knew her i nTrenton, Missouri, about Earle. I do not know whether she was a single woman of that name or married to a man of the name of Earle. I do not know when she became associated with Dr. J. H. Kerfoot. She lived with him when he lived in Trenton, Missouri. She was cooking for the family. She was just doing the cooking and general house work while there. The first time I seen Dr. Kerfoot in Kansas, she was living with him. She was doing the work for him, doing the cooking and straightening up the house. She lived with him while he lived in California. The first time he went she went along with him. She didn't go with him the second time. I went. She came soon after we got there. When he went from California they went to Kansas City, Kansas. They went back together, and the children. I stayed in California. They lived together in Kansas City, Kansas. I don't know whether or not Mona Kerfoot was ever married to a man named O'Neal. When she first lived with Kerfoot his first wife was still living. I know about some trouble growing out of her living with him while his first wife was living. Mrs. Kerfoot thought Dr. was paying a little more attention to her than he ought to, I guess. Mona Kerfoot then went away from Trenton. I
26 do not know where she went. I first seen her afterwards about two or three years afterwards, in Kansas City, Kansas, about seven or eight years ago. Dr. Kerfoot's first wife died in the spring of 1886, at Trenton, Missouri. I think her name was Margaret. I don't know whether Dr. Kerfoot ever claimed to be married to the defendant, Mona Kerfoot, or not. He never said anything to me about it. In my association with Dr. Kerfoot and the defendant, Mona Kerfoot, they never claimed to be husband and wife. They never said anything to me about it. They never, neither of them. I never heard them speak of it at all. Dr. Kerfoot left Kansas City, Kansas, and moved away from there the last time in the fall of 1893. I knew Dr. Kerfoot had children by his first wife. He had

Robert, Lizzie and Theda. That is all I know. They are all dead. I don't know how old Robert was at the time I knew him. He was pretty near of age. The two girls, Lizzie and Theda, were about nineteen. These children performed services for him and helped him in his business. Robert worked on the farm and done what work was to be done there. The two daughters worked in the house and helped him there some, helped their mother some. I don't know whether I was acquainted with Dr. Kerfoot's property much prior to his death. I was tolerably well acquainted with his business. At the time of Dr. Jas. H. Kerfoot's death he did not own any real estate anywhere that is not covered by the descriptions in the deed mentioned in the testimony of T. J. Beall. I don't know whether he owned the lots at the place where he lived in Kansas City, Kansas, on the corner of 4th and Jersey streets, at the time of his death, or not: I don't know anything about them. I have heard the testimony of T. J. Beall in the respect to the notes and mortgages delivered to him by Dr. Kerfoot before his death, his statement about the bill of sale executed by me and the statement about the mortgage on the lots in Kansas City, Kansas. Dr. Kerfoot did not leave, at the time of his death, any personal property not included in the statement made in Beall's testimony. In the deed made on March 14th, 1893, I conveyed to Hervey, Lester R. and Alwilda
27 Kerfoot, lots 8, 9 and 10, block 146, Campbell's addition to the City of El Paso, Texas. I did not hold the title at that time for anyone. I had all the title there was to it, I guess. It was mine at the time, until I conveyed it. I did not hold it for anybody else. J. H. Kerfoot bought the property and paid for it I suppose. I don't know how it come that I made the deed to Hervey, Lester R. and Alwilda. He, J. H. Kerfoot, wanted me to. I made it for that reason. The grantees did not pay me anything. At the time I made the deed to Hervey, Alwilda and Lester R. Kerfoot for the southwest quarter of town lot 142, and the southeast quarter of lot 143, in the City of San Jacinto, I had the title to the property. I didn't hold it for anyone. J. H. Kerfoot paid for the property. He wanted me to make the deed to these three children. I don't know that I had any interest in the property before he made the deed. I owned it at the time I made the deed to them. I had a deed to it which was the only ownership of it that I ever claimed. I never occupied the property. Didn't get any revenue from it. Dr. Jas. H. Kerfoot requested me to make the deed to the San Jacinto property to the children and I made it for that reason. They never paid me anything for the transfer. I did not have any interest in the lot in El Paso, Texas, when I made the deed conveying these lots to said children. The personal property described in the bill of sale which I made to these children was mine then. J. H. Kerfoot gave me a bill of sale of it. I never paid anything for any of said property. I say it was mine because I had a bill of sale and for no other reason. Dr. Kerfoot bought and paid for all the property mentioned in the bill of sale. Dr. Kerfoot executed to me a mortgage on lots 1, 2, 3 and 4, in block 50, in Wyandotte, now Kansas City, Kansas, to secure a note for $2,000, dated Kansas City, Missouri, Aug. 30th,

1893, payable five years after date, bearing interest at the rate of 8 per cent. per annum. Which note I assigned to Hervey, Lester and Alwilda Kerfoot. I did not loan Kerfoot any money. He did not owe me any debt. I do not know why he executed that note and mortgage to me. While I lived with Dr. Kerfoot during the
28 ten or eleven years before his death I worked on his farm. He wanted me to live with him. In California I took care of his trees and flowers, and in Trenton, Mo., I worked on his farm and did what was to be done there. When not on the farm in Trenton, Mo., when not working in California, I did whatever he wanted me to do. When the deed to the San Jacinto ranch to me was made Dr. J. H. Kerfoot delivered it to me. The other deeds testified about, made out to me, I did not have at all. After I signed and acknowledged the deed to Lester, Alwilda and Hervey Kerfoot, I gave them to Dr. Kerfoot. Robert Kerfoot was the last one of the three children of Dr. Kerfoot, by his first wife, that died. He died after his mother died. Since Dr. Kerfoot moved to El Paso I never heard Mona Kerfoot make any statement about her relations with him. Never heard her make any statement as to whether she was Dr. Kerfoot's housekeeper or not.

Cross-examination:

The three children of Dr. J. H. Kerfoot by his first wife, named Robert, Lizzie and Theda, are dead. Lizzie has been dead about fifteen years. Theda died about 1885. And it has been seven or eight years since Robert died. He died in Trenton, Mo. He shot himself. I did not see anyone with him claiming to be his wife prior to his death. I don't know how long Robert has been at Trenton just prior to his death. He stayed at the hotel in town. Did not stay at the Dr's house. He must have been there a week. Had a conversation with him the Sunday before his death, as to his being married. He said that there was a good many women that would likely become his wife if they got a chance? He did not say he was not married. That's all I recollect of him saying about the matter. He was twenty-eight years old. At the time of his mother's death he stayed all night at his father's house, then went away. He didn't come back any more until a week before I found him in the wood shed, dead. A woman came there after he came back to Trenton the first time, claiming to be his wife. She came to the hotel and stayed there and Robert went away. He went to a farm house. She sent out messages to the house several times to see if he was
29 there. She told the messenger boy if she found him she was going to have him arrested. The messenger boy said so at the house. She didn't know where he was. She didn't find him. He was found laying in the wood shed. He was laying on some blankets. He had another blanket over him. His overcoat and boots were off and he was dead. There was a small wound over the heart on the left side. It looked like a pistol shot wound. There was a pistol found on the same side where the wound was. It had been discharged. The woman who claimed to be his wife and threatened his arrest had a baby with her at the time she came to Trenton.

It was a young child. I don't know how old. It was able to stand. About ten or twelve months old. Dr. Kerfoot did not recognize this woman as the wife of Robert Kerfoot at that time. He objected to her attending the funeral. He told her if she came there with the intention of having Robert arrested he would rather she wouldn't attend the funeral at all. Dr. Kerfoot received her at his house a little while in his room. He had about a half hour's conversation with her after Robert's death. That is all the time she was in the house. She stayed at Trenton a couple of days after Robert's death. Prior to the time the woman came to Trenton with the child she, Robert's wife, had written to J. H. Kerfoot. She claimed to be Robert's wife. She sent her picture to him and told him she was married to Robert and he had left her and she told him if he wanted somebody to keep house for him she was willing to come down and keep house for him. She inquired of him if he knew where Robert was. I don't know where Robert was at that time. He went away from Dr. Kerfoot's house about 1886 and hadn't been back since. This letter was received ten or twelve days before Robert Kerfoot's death. Dr. Kerfoot after reading the letter said, "If she comes here then Bob would be wanting to come," so he wouldn't have her come back. I don't think Dr. Kerfoot knew anything about the marriage before receiving the letter. He was surprised to hear it. The children of Dr. J. H. Kerfoot and Mona Kerfoot now living are Hervey, Alwilda and Lester, John R. and one dead. They called him Juan. I was present or living in the house with Dr. Kerfoot and Mona Kerfoot when four of these children were born. Lester was born in El Paso. I was not present when Hervey was born. Dr. Kerfoot attended at their birth. I was in the house but not in the room at their birth. Saw them about ten minutes after. The Dr. would call me in to show me what he had. When I first saw Hervey, Dr. Kerfoot was living in Kansas City, Kansas. He wrote to me to come down there. I went down, went to his house where he was living and saw Hervey there the first time. He was a little over two years old. Dr. Kerfoot was there. Dr. Kerfoot moved with his family after he left Kansas City, Kansas, next to the last time to California. He first went to Los Angeles, stayed there about four months. While there he visited San Diego or National City, near San Diego. He took Hervey with him, none of the rest. He lived with Mrs. Kerfoot and the children in a rented house at National City about five months. They did not live together on the San Jacinto ranch. He was not on the ranch before going there from Texas, last summer. I was with Dr. Kerfoot and family when they lived at National City. They kept house together. Had two beds in adjoining rooms with door open between. The Dr. always treated his children kindly and was much attached to them. Hervey was with his father a great deal. Went with him every place he went. I was present when Dr. Kerfoot died. Mrs. Kerfoot and all the children were present. Capt. Beall and Dr. Beall were present. Mrs. Kerfoot and the children were deeply grieved at his death. After his death the children came in and commenced to cry and call him poor "Pere," and said we have got no "Pere" now. I attended

the funeral. Mrs. Mona Kerfoot and her children also attended. They were very much affected at the grave. Weeping and crying. Dr. Kerfoot had lived with Mrs. Mona Kerfoot and children eleven or twelve years, as his wife. He lived with her as such in California, altogether about ten months. Don't know how long he lived with her in Texas. I was here and stayed three months, then went back to California, then about three months the second time. Did not come with her when they first came to El Paso. Don't know
31 where they lived when they first came. I first came to El Paso in December, 1892. I went to the present house at the corner of Ochoa and 1st streets, where Dr. Kerfoot died. Don't know when the house was built. It was a new house just finished. Mrs. Kerfoot lived at that house since that time as Dr. Kerfoot's wife, with his children. I was at Dr. Kerfoot's house in Trenton, Mo., at the time his first wife died. He had occupied that house about a year at that time. Dr. Kerfoot and his wife did not occupy the same room. He slept up stairs and his wife down stairs. They lived peaceably. Mrs. Kerfoot was sick most of the time. They didn't live together. That was the condition of things before Mrs. Earle, now Mona A. Kerfoot, came there to work. Prior to that time they used to have little disagreements once in a while. Mrs. Earl did not refuse to stay there on account of the disagreements. Mrs. Kerfoot got after her and wouldn't let her stay. She wanted her to go away and she done so. Dr. Kerfoot executed a deed to me for the southwest quarter of lot 142, and the southeast quarter of lot 143, as per map of San Jacinto Land Association, Riverside county, California. This instrument handed me is the deed. I did not present it for record. I don't know whether it is the deed Dr. Kerfoot made to me to the San Jacinto property or not. I am pretty well acquainted with Dr. Kerfoot's signature. This is his signature to this deed. Since examining signature to the deed this is not the deed he executed and delivered to me. It is not the one I got. He had that made for the San Jacinto property and six lots in San Diego included in on- deed. I signed this deed to the San Jacinto property to Dr. Kerfoot's children. I signed the deed to the El Paso property and delivered to Dr. Kerfoot for his children. Also the bill of sale to the personal property. I signed this endorsement on the back of this note given by J. H. Kerfoot payable to the order of John Ryan for $2,000. Dr. Kerfoot never made me but one deed to the San Jacinto property. It was up here at the house. I put it on a shelf over the fireplace before he died and hav-n't seen it since. I put it there along toward the last of January, 1894. Can't
32 give exact date. I am not positive that he did not execute the deed shown by Mr. Beall.

Redirect examination:

Dr. Kerfoot owned some lots in San Diego. The deed from Dr. Kerfoot to me covering the San Jacinto property and the San Diego property was not recorded. I saw the deed which Mr. Beall has shown me here from Dr. Kerfoot to me covering the San Jacinto property before Dr. Kerfoot showed it to me in El Paso and told me

it was one he had made for me and got it recorded in Riverside. Hervey Kerfoot, Alwilda nor Lester nor any other person ever paid me anything as a consideration for the endorsement of the $2,000 note to them. I endorsed the note because Dr. Kerfoot wanted me to. I never received any consideration from anybody for executing the bill of sale referred to. The San Jacinto property is worth $4,000 or $5,000. The property mentioned in the bill of sale I would not give $600 for it. Don't know what it was worth in California. Don't know what the El Paso property was worth at the time of Dr. Kerfoot's death. It was worth $2,000 I guess. The Campbell Real Estate Co. conveyed to me lots 6 and 7, block 146, Campbell's addition to El Paso. That is the two lots just south of the three in the block just mentioned. Dr. Kerfoot told me he had bought two lots for me. The two lots south of his house were the ones he bought for me. He paid for them. I never received the deed to them. He said he had a deed made to me and had it recorded. I never saw it. I do not know why he had the deed made to me. When I said that Dr. J. H. Kerfoot and the defendant Mona Kerfoot lived together as man and wife I meant they had been occupying one room of nights. I don't know any other answer to give to that. Dr. Kerfoot never said to me during his life or to any one in my presence that the defendant Mona Kerfoot was his wife. The defendant Mona Kerfoot never said to me in the presence of Dr. Kerfoot or to any other person when I was present that Dr. J. H. Kerfoot was her husband. Dr. Kerfoot's first wife died in 1886. When I
33 first saw Hervey Kerfoot I went to Kansas City, Kansas, first in response to a letter from Dr. Kerfoot. I went from Trenton, Mo. in the fall of the year. Think it was in 1887 or in 1888. I don't know how long it was after the death of Dr. Kerfoot's first wife. It was a year, anyway. I do not know whether Hervey was born before the death of Dr. Kerfoot's first wife or not. I had lived with Dr. Kerfoot before I saw Hervey. Don't know whether Dr. Kerfoot lived with Mona before the death of his first wife or not. Hervey was about two years old when I first saw him at Kansas City, Kansas, when I went there after receiving the Dr.'s letter.

Plaintiff read in evidence marriage license issued by S. A. Douglas, the Recorder of Deeds of Bates county, Missouri, bearing date October 24th, 1891, authorizing the marriage of James H. Kerfoot and Miss Clara A. Printz. License being in regular form and certificate of marriage as follows:

STATE OF MISSOURI,
County of Jackson, ss:

This is to certify that the undersigned, R. L. Jamison, did at Kansas City, in said county, on the 26th day of October, 1891, unite in marriage the above named persons, that is, James H. Kerfoot and Miss Clara A. Printz.

(Signed) R. L. JAMISON,
Pastor of the M. E. Church at Braymer, Missouri.

Filed for record 6th day of January, 1892, in the Recorder's office of Bates county, Missouri.

S. A. DOUGLAS, *Recorder.*

G. L. WINTERS, insurance agent, testified that he wrote insurance on the property in controversy. Witness produced and identified policy records of insurance on property in controversy in German Ins. Co. of Freeport, Ill. Policy No. 529, for $2500, to James H. Kerfoot, for one year, expiring Nov. 7, 1894. Policy canceled and re*q*ritten in policy 533, on same property to The First National Bank of Trenton, Mo. Term one year. Expiration of risk, Nov. 9, 1894. Amount $2500.

34

Plaintiff also read in evidence similar entries as to concurrent insurance on same property in The Queen Ins. Co., showing cancellation of policy in name of James H. Kerfoot, and rewritten in name of First National Bank of Trenton, Missouri.

W. A. RULE'S deposition read in evidence:

I am cashier of National Bank of Commerce, of Kansas City, Missouri. I was acquainted with Dr. J. H. Kerfoot, deceased, who formerly resided at Trenton, Missouri, and died at El Paso, Texas; in Feb. 1894. I first got acquainted with him in 1890, probably earlier. Knew him simply in a business way and his visits to the bank would probably be about ten or twelve times in a year, such dealings as a banker would have. He called on us for matters outside of the banking business occasionally. I remember of Dr. Kerfoot sending me a deed to property in Grundy county, Missouri. I can't recall any description, requesting me to forward same for record, sending money for recording and also sending me a warranty deed filled out deeding property back to some other parties, asking to have both put on record. Our attorney objected to my giving back a warranty deed and sent Kerfoot quit claim deeds. Kerfoot returned these quit claim deeds and I had them properly acknowledged and recorded. I presume $1 was the consideration. He did not state his object to me of the conveyance. I paid nothing. I think it was only a few days after Kerfoot deeded the property to me that I deeded it back to the other parties. There was nothing paid to me for the conveyance of the property to these parties. My recollection was that Dr. Kerfoot asked me as he had often done before to do him a favor without stating what it was and wrote me from some point inclosing the deeds and instructing me what to do. After the deeds were made I forwarded them, my recollection is, to the Recorder at Trenton, Mo. I don't recall whether they were returned to me or whether I instructed the Recorder to forward them to Dr. Kerfoot.

35

Q. Tell what directions or instruction you gave to Dr. Kerfoot or any one else about delivering the deeds you made?

A. None that I recall. I could not produce the letters from Dr. Kerfoot about the matter. They have been destroyed. Dr. Kerfoot advised with me in no way about his business except to use us in making remittances or to borrow money. We always understood

that he was a widower until after he was a corpse. He spoke about being alone. I don't know that he ever said to me or to any one in the bank that he was single or unmarried. Dr. Kerfoot stated one day in the bank that he had taken occasion to refer to us and that he had put an advertisement in the paper and that he would appreciate a good reply to any inquiries. A few days later we received an inquiry from a female, I think in Illinois, asking in regard to him. Stated that she was about to answer an ad. of his for a housekeeper. My recollection is that he made no statement whatever as to his relationship to the parties to whom I made the deeds. I know nothing whatever of Dr. Kerfoot having married Mona Earle or Mona O'Neal at Los Angeles in December, 1889. I don't know where Dr. Kerfoot resided or with whom while he resided in Kansas City. All our communication we had with him he requested me to address to general delivery at the postoffice.

Deposition of HARRY G. CRAIN was read as follows:

I am receiving teller of National Bank of Commerce, Kansas City, Missouri. Was acquainted with Dr. J. H. Kerfoot, deceased, who formerly resided at Trenton, Missouri, and died at El Paso, Texas, Feb. 1894. He used to make the bank his loafing place. I used to see him about every day while he was in the city. I became acquainted with him about seven years ago. I was no more intimately acquainted with him than any other customer of the bank. Never had any other dealings with him outside of the bank. I have as notary public taken his acknowledgment of certain deeds.

36 Can't remember the dates of the acknowledgments. He told me his wife was dead. I read the acknowledgments to a party and did not call his attention to it any more particularly than I would of anybody else. I may have taken some after he was married. Up to the time he was married he said he was single and unmarried. He married a woman, I think her name was Printz. I do not know her first name. Do not know the date. Understood him to be married in Kansas City, Kansas. The fact of his marriage to Miss Printz was generally known among all Dr. Kerfoot's acquaintances in Kansas City, Mo., that I know of. One of the facts which I knew and led me to believe and indicated that Dr. Kerfoot was unmarried, prior to his marriage to Miss Printz was that he was waiting on an aunt of mine. He was calling on her. I think it was in the fall of 1890.

Deposition of FERD K. RULE read:

I am auditor of the Los Angeles Terminal Railroad Co. and reside in the City of Pasadena, Cal. Was acquainted with one Dr. J. H. Kerfoot. Met him in the spring of 1890 in Kansas City, Mo. Previous to that time I had known him by reputation through hearing him spoken of by my brother, W. A. Rule, of Kansas City, who is connected with the National Bank of Commerce there. I met him probably not more than five or six times during that year. He came from Kansas City, Missouri, to California. Traveled considerably back and forth between San Diego and Los Angeles on the one hand and El Paso and Kansas City on the other. I am unable to

state just where he went at any one particular time. He did not live in Los Angeles, Cal., for more than a week at a time to my knowledge. His home when in California was supposed to be at or near San Diego. So far as I know he always boarded while in Los Angeles. I was not aware at the time that he had any family while living in Los Angeles.

Q. What relation did he claim to bear to the woman that kept house for him, or lived with him?

A. I was not aware that this woman was living with him, but when I met him in June or July, 1891, at a time when he was on his way from here to San Diego, he explained to me that the
37 woman was a housekeeper that he had brought out from Missouri. He never introduced her to me as such but simply stated to me that this was his housekeeper. He did not call her by name, no name was mentioned. I did not meet her face to face but saw her in the Dr.'s company at a distance two or three different times. I never met her in El Paso, Texas. I know nothing of Dr. Kerfoot living with her in El Paso, Texas, except what I have heard since his death. Dr. Kerfoot never mentioned Miss Printz to me at all. I never knew there was such a party as Miss Printz in existence till after Dr. Kerfoot's death, when she called on me at my office in Los Angeles and introduced herself as Mrs. Dr. Kerfoot, stating that she had been legally married to Dr. Kerfoot in Kansas City, Missouri, and desired to know what I could tell her about his business and his relations with another woman whom he claimed as his wife. I knew nothing about this alleged marriage except what was told me by this lady, and know nothing further up to the present time. I saw one, sometimes two children with Dr. Kerfoot at different times, either on the streets in Los Angeles or on board the train when he was on his way either to or from San Diego. He never made any explanation to me regarding these children except that one time mentioned above when he spoke of the woman as a housekeeper whom he had brought out from Missouri, and led me to infer that the children were hers.

LUTHER COLLIER testified:

About August 12th, 1890, I was engaged by Dr. J. H. Kerfoot to write a deed from him to James B. Carnes for what was known as the "Kerfoot farm," near Trenton, Mo. Carnes saw me before the deed was written and stated to me that there had been a little rumor afloat that Dr. Kerfoot had a wife, and requested me, in taking the Doctor's acknowledgment of the deed, to ask him the question straight if he was single, which I did in about this way: In filling up the certificate I said "Doctor, of course you are single. Shall I make the certificate show the fact?" and he said
38 "Yes sir, that is correct." The above is as near as I can remember the conversation, and is substantially correct.

Plaintiff read in evidence deed from Clara A. Kerfoot, of Jackson county, State of Missouri, to Thomas J. Beall, dated Jan. 23rd, 1894, consideration $4,000, conveying and assigning to the said T. J. Beall, as guardian of the estate of Hervey, Alwilda and Lester

R. Kerfoot, all the right, title and interest and claim of the said Clara A. Kerfoot in the property and estate of Jas. H. Kerfoot, deceased, conveying, releasing and forever quit claiming unto the said T. J. Beall all right of dower or homestead claim in any of the land or property of the said estate of Jas. H. Kerfoot, deceased, to which the said Clara A. Kerfoot may be entitled as the surviving wife of said Jas. H. Kerfoot, deceased, and all right of dower that she might have become entitled to as the widow of the said Jas. H. Kerfoot, deceased, in and to the property acquired by Hervey, Alwilda and Lester R. Kerfoot by assignments, deeds and mesne conveyances from their father, James H. Kerfoot. Which deed was duly acknowledged on the 23rd day of June, 1894, and recorded in Recorder's office of Grundy county, Missouri, book 49, page 532.

ALICE B. WELLS testified:

I was acquainted with Robert H. Kerfoot. He died at Trenton, Missouri, the 24th day of November, 1886. I was not present at his death, was present at his funeral. He was buried at Trenton, Missouri. Was the son of Dr. James H. Kerfoot. He had no brothers or sisters living at the time of his death. Robert H. Kerfoot was the father of Robert Earle Kerfoot, the plaintiff in this suit, here present in court, and the son of James H. Kerfoot, deceased.

Cross-examination:

I first met Dr. James H. Kerfoot at Trenton on the day of the death of Robert H. Kerfoot. Had never seen him before. Knew nothing particularly of his family relations prior to that time or after that time. Never saw him after that time. I was not
39 acquainted with his family relations personally. I knew it through others. I was married to Robert H. Kerfoot, Nov. 27th, 1885. Was never at Dr. Kerfoot's house at any other time. Knew nothing of his other children of my own personal knowledge. I knew he lived in Trenton, knew where he lived after that by others. I got letters from Dr. Kerfoot. I have three I think. They are not now in my possession. I expect they are in Mr. Nichol's possession. Dr. Kerfoot knew of our marriage prior to my visit here at the death of Robert H. Kerfoot. He got that knowledge of our marriage by my writing to him. I don't know the dates. I knew my husband, Robert Kerfoot, had been here some few days prior to his killing himself. It was before he left and came here that I wrote to Dr. Kerfoot. I don't know how long before. I don't know when Dr. Kerfoot first had any information that I and his son were married. I never visited him and he never seen that child (Robert Earl Kerfoot, the plaintiff) except the time I was here. He never made it any presents of any kind. I don't suppose he was asked to do that. I didn't think that was necessary. The child was nine years old on the sixth of May.

Plaintiff read in evidence deed from James H. Kerfoot to Jas. B. Carnes, dated Aug. 12th, 1890, acknowledged before Luther Collier, notary public, Aug. 12th, 1890, in which deed he states he

was a single person, and in the certificate of acknowledgment acknowledged himself at the time to be single and unmarried.

Plaintiff read in evidence deed from Jas. H. Kerfoot to J. H. Patton, dated Sept. 3rd, 1890, acknowledged Sept. 5th, 1890, before Henry C. Crane, a notary public, of Jackson county, Missouri, in which certificate of acknowledgment he acknowledged himself to be single and unmarried.

Plaintiff read in evidence warranty deed from Jas. H. Kerfoot to Sallie B. Patton, dated Jan. 13th, 1891, acknowledged Feb. 20th, 1891, before G. W. Beermaker, notary public, San Diego, California, in which deed he acknowledged himself to be single and unmarried.

Plaintiff read in evidence letters of administration granted
40 by the probate court of Grundy county, Missouri, to plaintiff, Homer Hall, upon the estate of said James H. Kerfoot, deceased.

Plaintiff read in evidence records of a judgment or claim allowed by the probate court of Grundy county, Missouri, in favor of Sallie Rice against the estate of Jas. H. Kerfoot, deceased, for twenty dollars and ninety-five cents, Aug. 13th, 1895, and assigned to the fifth class.

Plaintiff rested.

Defendants offer in evidence warranty deed from Jas. H. Kerfoot to —— ——, dated Nov. 2nd, 1891, in which he says he is a single man, acknowledged on the 2nd day of Nov., 1891, before Bessie E. Young, notary public, Jackson county, Missouri, in which certificate of acknowledgment he declares himself to be single and unmarried.

Defendants read in evidence deed from Wm. A. Rule to defendants Hervey, Lester R. and Alwilda Kerfoot, dated Nov. 11th, 1893, conveying lot 1, block 78, Harton's addition, San Diego, California.

Defendants read in evidence deed from said Rule to said defendants, dated the 6th day of Nov., 1893, conveying lots 6, 7 and 8, and forty feet off of the west side of lot 9, block 14, Harris' addition to the Town of Trenton, Grundy county, Missouri.

Deposition of THOS. J. BEALL, was read as follows:

I reside in the city of El Paso, El Paso county, Texas. Have resided there about nine years. I knew Jas. H. Kerfoot very well, knew him in the city of El Paso. He died in El Paso on the 4th day of Feb., 1894. About one week prior to Dr. Kerfoot's death he left in my hands for his children, Hervey Kerfoot, Alwilda and Lester R. Kerfoot, the following deeds, notes and papers: A deed from John Ryan to Hervey, Lester and Alwilda Kerfoot, conveying lots 8, 9, 10, in block 146, in Campbell's addition to the city of El Paso, dated the 14th day of March, 1893, acknowledged before F. E. Farrel, filed for record Feb. 20th, 1894, and recorded in deed
41 records of El Paso county, volume 39, page 100. Deed by First National Bank of Trenton, Missouri, by C. H. Cook, vice-president, dated Oct. 9th, 1893, conveying to Hervey, Alwilda and Lester R. Kerfoot, the property in controversy, described in deeds heretofore read in evidence; filed for record Feb. 20th, 1894, and recorded in book 31, page 474, in recorder's office in Grundy

county, Missouri. A deed from J. H. Kerfoot to Wm. A. Rule, conveying lot 1, block 78, Harton's addition to San Diego City, California, dated Nov. 1st, 1893, and recorded Dec. 2nd, 1893, in San Diego county, California. A deed from W. A. Rule and wife to Hervey, Lester R. and Alwilda Kerfoot, conveying the same property described in the last mentioned deed, dated Nov. 11th, 1893, and recorded March 1st, 1894, in San Diego county, California. A deed from J. H. Kerfoot to W. A. Rule, conveying lots 6, 7 and 8, and a strip 40 feet wide off of the west side of lot 9, block 14, in J. E. Harris' addition to the Town of Trenton, dated Nov. 1st, 1893, and recorded in recorder's office of Grundy county, Missouri. Also a deed from W. A. Rule and wife conveying the same property in the last named deed to Hervey, Lester R. and Alwilda Kerfoot, dated the 6th day of Nov., 1893, filed for record Feb. 20th, 1894, in the recorder's office of Grundy county, Missouri, record book 49, at page 42. A deed from John Ryan to Hervey, Alwilda and Lester R. Kerfoot, conveying the southwest quarter of town lot 142, and southeast quarter of town lot 143, in Riverside county, in the City of San Jacinto, California, dated Nov. 4th, 1893, filed for record Feb. 20, 1894. A deed by J. H. Kerfoot to John Ryan, conveying the same property described in the last mentioned deed, filed for record Nov. 3rd, 1893, and recorded in Vol. 7, page 206, Riverside county, California. At the time Dr. J. H. Kerfoot delivered to me these deeds above described, he delivered to me for his children, Hervey, Alwilda and Lester R. Kerfoot, the following notes: Two notes executed by M. W. Stanton, payable to the order of Kate M. McKelligon for two hundred and fifty dollars each, dated
42 Feb. 13th, 1893, one due Aug. 13th, 1893, and the other Feb. 13th, 1894, bearing 10 per cent interest, endorsed in blank. Said notes assigned in writing to J. H. Kerfoot, Feb. 13th, 1893, and by J. H. Kerfoot to Hervey, Alwilda and Lester R. Kerfoot, Oct. 20th, 1893. A note executed by C. Q. Stanton for $2500, dated Jan. 15th, 1893, with interest at 10 per cent from date, payable to the order of J. H. Kerfoot and assigned to Hervey, Lester and Alwilda Kerfoot. Three notes of Edward B. Wardner for $450 each dated Oct. 20th, 1893, to J. H. Kerfoot, due in one, two and three years, with 12 per cent interest from date, assigned to Hervey, Alwilda and Lester R. Kerfoot. Notes executed by James A. Smith and Alice M. Smith to O. T. Bassett and assigned to J. H. Kerfoot, being nineteen in number aggregating $1700, and assigned by J. H. Kerfoot to Hervey, Alwilda and Lester R. Kerfoot, Oct. 20th, 1893. A note executed by John Sorrenson to Jas. H. Kerfoot for $1900, dated Jan. 30th, 1893, with 10 per cent interest from date, assigned to Hervey, Alwilda and Lester R. Kerfoot.

[On the 27th day of Jan., 1894, as I now remember the date, Dr. J. H. Kerfoot employed me as attorney to protect the rights of his children in the property conveyed by the deeds and notes which he delivered to me, and assigned to me on that day a note for $7000, executed by Ferd Rule and secured by a mortgage on certain land in California, stating that he had no money on hand and that it would be necessary to provide for his creditors; under my advice he in-

structed me to collect the note and pay off a debt of $1000 which he owed to J. H. Patton, of Trenton, Missouri, and also a debt of $500 to the Trenton Bank and balance "use as your own and at your discretion in protecting the rights of my children in the property which I have given them." He then requested me to draw an assignment of the note and mortgage to me in absolute terms and bring up a notary to take his acknowledgment.]

(To all that part of said deposition inclosed in brackets the plaintiffs, by counsel, objected to prior to its introduction as being
43 incompetent, said Jas. H. Kerfoot being dead, and said witness Beall being a party to the suit and a party in interest and to the contract in regard to the transfer of said property now in issue and on trial, the said witness Beall is disqualified and incompetent to testify to said transaction under the statutes of the State of Missouri. The court overruled said objections and permitted said testimony and part of said deposition to be read. To which action and ruling of said court plaintiff excepted at the time.)

I prepared the assignment of the note and mortgage and he acknowledged it before Mr. Lackland, the cashier of the State National Bank, as a notary public. This note I collected. These are all the notes and deeds that I remember were delivered to me by Dr. Kerfoot in his life time.

Some time after his death I received from Mrs. Mona Kerfoot certain papers. Among others a bill of sale from John Ryan to Hervey, Alwilda and Lester Kerfoot, conveying certain personal property on the Kerfoot ranch in San Diego county, California, to-wit: One two-seated carriage, three mares, three yearling colts, two horses, five Jersey cattle, one road wagon, one cart, one set of double and one set of single harness, two chester sows and eight pigs, four dozen chickens, and all household furniture and ware, carpets, books and other furniture now at the corner of Ochoa and 1st streets, Campbell's addition to the City of El Paso, consisting of two bedroom sets, all books, Appleton's Encyclopædia and other books, a desk, lounge, chairs, stove, etc., dated March 11th, 1893, acknowledged before D. S. Farrell same day. Also bill of sale executed by J. H. Kerfoot, dated March 9th, 1893, conveying to John Ryan the same property, acknowledged before W. H. Long, notary public. I know Hervey, Alwilda and Lester R. Kerfoot, the children above mentioned. Have known Hervey since Jan., 1893. Never met the other children until I called to see the Dr. during the last sickness,
during Jan., 1894. Prior to Dr. J. H. Kerfoot's death I
44 never had any business transactions or dealings with any of his children. Don't know whether either of his children prior to the death of Dr. Kerfoot knew of the execution of these deeds above mentioned, or the assignment of these notes to them. [But was shown letters by Mrs. Mona Kerfoot from Dr. Kerfoot, mentioning the transfer of the notes and the execution of the deeds to his children, which letters I now have in my possession and they can be produced if called for.] (To the above statement by the witness, plaintiffs objected at the time and asked to have it excluded for the reason that the same was incompetent, 1st, because if said Mona Kerfoot was the wife of said J. H. Kerfoot, as claimed by the

defendant, then under the statutes said letters and communications from the husband to the wife were incompetent; 2nd, because said letters were the best evidence of their contents. The court overruled plaintiff's objection and admitted said evidence, to which action and ruling plaintiff excepted at the time.)

I would judge Hervey Kerfoot to be about nine years of age from his appearance, Alwilda to be about seven and Lester four or five. I know Mrs. Clara A. Kerfoot. Don't know where she lives. I met her in June, 1894, in Kansas City, Missouri. I do not know whether she sustained any relationship to Dr. Jas. H. Kerfoot at the time of his death, of my own knowledge, or not. She claimed to have been married to Dr. Kerfoot, and to avoid scandal I compromised her claim as guardian of the Kerfoot children. On the 23rd day of June, 1894, I compromised with Mrs. Clara A. Kerfoot any claim which she might have to any of the property or the estate of Jas. H. Kerfoot, deceased, and any exemption to which she might be entitled as the surviving wife of Jas. H. Kerfoot, and received from her a conveyance, and relinquishment to myself as guardian of the estate of Hervey, Alwilda and Lester R. Kerfoot. Said instrument was acknowledged by her before Harry G. Crain, a notary public for Jackson county, Missouri, on the 23rd day of June, 1894, and recorded in the recorder's office of Grundy county, Missouri, in book 49, at page 532. The consideration
45 was $4000. I obtained the money paid from the Rule note.

Among the papers delivered to me by Mrs. Mona A. Kerfoot about two or three months after I was appointed guardian of the estates of Hervey, Lester and Alwilda Kerfoot, was a certain mortgage executed by J. H. Kerfoot to John Ryan, conveying all of lots 1, 2, 3 and 4, block 50, in Wyandotte, now Kansas City, Wyandotte county, Kansas, to secure a note for $2000, dated Kansas City, Mo., Aug. 30th, 1893, payable five years after date with interest at 8 per cent. per annum. Said mortgage dated Aug. 30th, 1893, acknowledged same day and recorded in Book 11, page 522, which note and mortgage were assigned by J. H. Kerfoot to Hervey, Lester and Alwilda Kerfoot. Said note being enclosed in an envelope endorsed as follows: "Note and receipt the property of Hervey, Alwilda and Lester Kerfoot. (Signed) J. H. Kerfoot or their agent." Deeds and notes to which I have referred at the time mentioned when the conversation occurred between Dr. Jas. H. Kerfoot and myself and when they were delivered to me were all of them except the two notes for two hundred and fifty dollars each, of M. W. Stanton, and the Rule note for $7000, in a tin box sitting on the secretary in the room where Dr. Kerfoot was and about twelve or fifteen feet from him. The M. W. Stanton note and the Rule note had been delivered to me prior to that time. At the time he delivered the Rule note he requested Mrs. Kerfoot to get the Rule note and deliver it to me together with an abstract of the mortgage made to secure the same. After these last mentioned notes were delivered to me he then gave me the instructions with the assignment of the mortgage and the Rule note to myself. I believe the next day after the delivery of the Rule note he instructed Mrs. Kerfoot to deliver the

other notes and deeds to which I have referred. She got the deeds to which I have referred. She got the deeds and the notes from the tin box and delivered them to me in his presence. The deeds were inclosed in separate envelopes and indorsed with an indelible pencil in the hand-
writing of Dr. Kerfoot, to the recording officers of the dif-
46 ferent counties and states where the same were to be recorded and after the delivery of the deeds and notes he requested me to send them on and have them recorded, as they were not addressed in ink to the different officers. When I sent them on for record after his death I took them out of those envelopes and addressed them myself. After the delivery of the deeds I saw him daily until his death.

[And on several occasion- he asked me if I had sent the deeds on for record. I told him that they had been delivered and that that was sufficient. That I would keep them for the children. At the time I last told him this I was standing near him. He reclined in a chair and he took my hand and pressed it and said "I am satisfied." This was several days before his death and he never mentioned the matter any more.]

(To the foregoing statements contained in the brackets the plaintiff objected at the time for the reason that the same are incompetent. 1st, because it was the details of a conversation between the witness and his client in the absence of the plaintiffs. 2nd, The witness Beall being a party defendant to the matters in issue and on trial and a party in interest, and the other party, Kerfoot, being dead, he is thereby incompetent to testify as to such conversation. 3rd. The conversations had being several days after the delivery of the deeds were incompetent as a part of the *res gestia.* The court overruled plaintiffs' objection and permitted said portion of said deposition to be read, to which action of the court plaintiff excepted at the time.)

The individual I referred to as Mrs. Kerfoot, in my last statement, is the defendant, Mona Kerfoot. I do not know of my own knowledge that she was ever married to the deceased, Jas. H. Kerfoot. I took the deeds and notes away with me from the place where they had been given to me after I received them. Took them to the office and placed them in the safe of Davis, Beall & Kemp. I kept
them there in my possession until I sent the deeds to the
47 children on for record. My impression is that I did not send them for record prior to Dr. Kerfoot's death, although he had requested me to do so, as I was very busy in court, which was then in session. My impression is that I sent them on for record from fifteen to twenty days after his death. Dr. Kerfoot did not at the time he gave me the rule note for $7000 and the two M. W. Stanton notes for $250 each, or on any other occasion, execute to me any written instrument referring in any way to my relation to the note or to any of the documents or property I have mentioned, except the assignment to me of the Rule note and the mortgage to secure the same. I sent it together with the note to W. A. Rule or to Ferd K. Rule, his brother, I do not remember which, at the time the note was collected. I have not got a copy of the instrument or assignment

but I believe it is of record in Los Angeles, California. I have no written instrument referring to my relations to the notes mentioned and the other documents referred to in the evidence. None other was executed than the one mentioned. I cannot state from memory the language of the assignment. The note of Rule had been endorsed by an assignment to Hervey, Lester and Alwilda Kerfoot. Dr. Kerfoot erased the name of the three children and requested me to make it payable to myself over his endorsement, which I did, and to prepare an assignment of the note and mortgage in absolute terms to myself and to bring up a notary to make his acknowledgement, which I did. The assignment prepared by me was in absolute terms with authority to cancel the mortgage, but I am unable to state its exact language.

I had known Dr. Kerfoot from some time prior to Jan., 1893, and during the month of January, 1893, was employed by him to examine the title to some real estate upon which Mr. Sorrenson desired to obtain a loan. I examined the title to the land and reported to him and the loan was effected. After that time on several occasions Dr. Kerfoot consulted me in an informal way about his business until called through Dr. Vilas to see him during his
48 illness during January, 1894, though I often met him and talked with him socially prior to January, 1894. On the 27th of January, 1894, Dr. J. H. Kerfoot employed me as an attorney to protect the interests of his children in the property conveyed by the deeds and notes which he delivered to me. There was no litigation pending at that time that I was advised of, but Dr. Kerfoot expressed apprehension that there would be and said that he had adopted the method of having the property conveyed to his children through deeds, believing that it was better than a will, though he mentioned to me no particular person from whom this litigation would arise. [He asked my opinion as to whether the deeds and the note assigned in his life time would not be better to protect the children in the property. I told him I thought it would. He said for that reason he had adopted that plan. I then told him it was necessary to deliver the deeds in his life time. He said that he was aware of that, and the deeds were delivered to me as I have stated.]

(The plaintiff objected to the above and foregoing testimony detailing the conversation between the witness and his deceased client, Kerfoot, for the reasons last above stated. The court overruled the objection and admitted said evidence. To which action of the court plaintiff excepted at the time.)

I knew Dr. Kerfoot's physical condition at the time these notes and deeds were given to me. I can only state that he was sick but at the time was not complaining of any pain except that arising from his feet being swollen. As to what his real condition was I only knew what his physician told me. Dr. Kerfoot at the time was sitting in an arm chair in a reclining position. I learned from the physician that he had heart disease or heart trouble. His mind at the time was perfectly clear and he talked rationally. I do not know whether Dr. Kerfoot expected to die at that time or not. Two or three days after that time he spoke to me as a Mason, inform-

ing me that he did not want his body to be taken on the cars. This is the only reference made to his death at any time by him
49 in my presence or hearing. At the time Dr. Kerfoot told me to collect the Rule note, pay off certain debts and use the balance, I impressed my memory with the language used, will not say that it is in his exact language but in substance and meaning the same as that employed by him.

Cross-examination:

Dr. Vilas, who was attending Dr. Kerfoot, at the time, presented a letter addressed to me as the Grand Commander of the Knights Templar of the State of Texas, from the Grand Commander of the Knights Templar of the State of Missouri, introducing Dr. J. H. Kerfoot as a Knight Templar. This letter I have mislaid. At the time Dr. Vilas presented it to me he informed me that Dr. Kerfoot wished to see me and that he was sick. I had known Dr. Kerfoot a considerable length of time and had transacted some law business for him but up to that time he had never delivered this letter of introduction. This was the occasion of my calling to see him and led to my employment as the attorney of his children as stated in my deposition, and also induced me after his death to give him a burial with the attendance of the Knights Templar of El Paso Commandry. Dr. Vilas was also a Knight Templar at the time he delivered the letter of introduction. At the time of Dr. Kerfoot's last sickness Mrs. Mona Kerfoot attended and ministered to him very faithfully, as I saw her on many occasions when there, giving him his medicine and ministering to his wants. I saw her on several occasions, saw her rubbing his feet and legs and saw her rubbing his stomach when he complained of nausea two or three days before his death. At that time Mrs. Kerfoot had two twin babies about two months old and her attention was divided between them and Dr. Kerfoot. She was very devoted in her attentions to him and on several occasions in my presence would put her hand on his head and say "dear, how do you feel?" and otherwise treated him as an affectionate wife would her sick husband, and never at any time before me did Dr. Kerfoot intimate that there was anything wrong in his marital relations. Mrs. Mona Kerfoot and her children, Hervey, Alwilda and Lester, at-
50 tended the funeral as mourning members of the family and were deeply grieved, shedding tears at his bedside when he died, and at his burial. There was some photographs placed in my hands when Mrs. Kerfoot went to California after the death of Dr. Kerfoot. They were in a large envelope upon which was the following endorsement: "For Hervey, Alwilda and Lester R. Kerfoot. Presented by Pere, J. H. Kerfoot." These children called him "Pere," pronounced "Par."

Redirect examination:

At the time of Dr. Kerfoot's death my recollection is he had in the State National Bank of El Paso, Texas, some money. I do not remember the amount, but less than $200, which was transferred

to Mrs. Mona Kerfoot. At the time of his death aside from the papers I heretofore referred to, he had no other bonds or securities that I know of. I ascertained some time after the death of Dr. Kerfoot that he owned a half interest in a house and lot in San Diego, to which I have found no transfers to his children.

Deposition of Mrs. J. L. BEALL read as follows:

I live in El Paso, Texas. Lived there during and since the year 1892. Was proprietor of the Pierson Hotel in 1892. I knew Dr. J. H. Kerfoot and Mona Kerfoot in 1892. Dr. Kerfoot came there to engage rooms for himself and wife. He had his little boy with him, and his wife, little girl and little baby boy were coming. Dr. Kerfoot came first with the eldest boy. Said he wanted a large double room, one large room fitted up as a dining room and kitchen so his wife could have a place where the children could play outside the room where they slept. Think he engaged rooms inside of a week, before his wife and children came. When he brought her from the depot he brought her to my room and introduced her to me and my sister, Mrs. Jones, as his wife. He said "this is my wife and my two little children." This is the way he introduced them as near as I can remember. They boarded at the hotel not quite a month. Mrs. Kerfoot was introduced to the guests of the hotel as the wife of Dr. Kerfoot, and so treated and regarded while
51 there, with the knowledge of Dr. Kerfoot. Dr. Kerfoot and his family all occupied the same rooms. The servant slept in the kitchen. Dr. Kerfoot paid the board bill for the family. After they left the hotel they went to Mrs. Mathews' house, which I think is on Myrtle St., which they had rented. I visited the family at Mrs. Mathews' house several times. I don't remember the dates. The first time was about three weeks after they left the hotel. Dr. Kerfoot was there every time. He called Mrs. Kerfoot his wife in my presence. She wasn't in the room when I went there and I asked him how his wife was and he said his wife was well and he would go and call her. He brought her into the room. The last time I saw him he told me he was going to California. He told me on one of my visits his wife was going on to Kansas City to close up the house there and would join him in California. I did not visit the family on their return from California to this place until after the death of Mr. Kerfoot. Have visited Mrs. Kerfoot several times since. This is the same lady and children to whom I was introduced to by Dr. J. H. Kerfoot in Jan., 1892, as his wife and children.

Cross-examination:

I was in the hotel business when I first saw Dr. Kerfoot. Saw him first at my hotel. It was there he spoke to me about securing rooms. If I had known the woman who was introduced to me by Dr. Kerfoot was not his wife they could not have occupied rooms in my hotel. Dr. Kerfoot was at my hotel about ten days after engaging rooms before his wife came. They didn't stay in the hotel quite a month. The woman did not show a disposition to seek the

acquaintance of other people. She said the children took up all of her time and she couldn't keep herself fixed up as nice as she wanted to. She was often in our room, though, and met the other ladies in there. I never knew of her going out to visit other ladies in El Paso while she was at the hotel. She went out but I
52 didn't know where she went. Didn't know her visiting other ladies after she left the hotel. Dr. Kerfoot left the hotel with the woman before the time had expired for which he had engaged rooms. He said he would be there at least three months and if he liked El Paso he would stay until it was time to go to California. I fitted up a kitchen and dining room for him at an expense of $60. He left before the first month was out. I objected in the first place to fitting up the kitchen and dining room on account of the expense. He said if anything should happen that he had to go away he would pay for all the expense. But when he came to leave he refused to do it. So I went down to his house and tried to get him to pay me what the second hand man offered me for the things. I went several times and finally got some small amount. These are the visits I had in mind when I said I had met the woman on several occasions after they had left the hotel. I didn't see her every time unless I asked for her. I don't remember ever hearing the woman say that she was Dr. Kerfoot's wife. Don't remember that there was any necessity for it. It was thoroughly understood that she was his wife and was considered so.

Redirect examination:

I have heard Dr. Kerfoot urge Mrs. Kerfoot to put on her nice clothes and go out among the ladies in the hotel. She was introduced as his wife and was always treated as his wife. No one suspicioned for a moment that she was not his wife. She never under any circumstances intimated that she was not his wife, and spoke of him as her husband. She as frequently called him my husband as she did Dr. Kerfoot, or the Dr. I always introduced her as Dr. Kerfoot's wife, and don't know that she had any occasion to introduce herself.

Deposition of Dr. A. L. JUSTICE:

Residence, El Paso, Texas. Have been actively engaged in the practice of medicine for thirty-seven years. Knew Dr. J. H. Kerfoot. My first acquaintance with him was about a year and a half before his death. I was called to see a sick child of his. He
53 was living diagonally across from the Texas and Pacific depot, at the corner of 1st and Ochoa streets, in El Paso. I was introduced at that time to a lady as Mr. Kerfoot's wife. I noticed several children. Didn't notice particularly as to the number. Noticed several children about the house. Was called to see Dr. Kerfoot about Jan. 20th, 1894. Dr. Vilas had been attending him before I called. I was called in the absence of Dr. Vilas. I attended him just ten days. I had arranged to go East and left Jan. 31st, and was succeeded by Dr. Beall. I remember to have expressed the opinion within a day or two after my first visit to Dr. Kerfoot that

the condition was inevitably fatal. I last saw him the 31st of Jan., 1894. I had no reason to change my mind as to his condition at all. I believe I expressed the opinion very decidedly to Dr. Beall, and he concurred. His case was a condition of disease of the heart, and the larger blood vessels leading from the heart. The last time I saw him his lower extremities were very much swollen. He retained his intelligence perfectly up to the last time I saw him.

Cross-examination:

The first time I saw him I think his mind was perfectly sound. Have known Dr. Beall. My first acquaintance with him was in that case. Known him for several years by reputation. He is the brother of T. J. Beall. I have not been paid for my services attending Dr. Kerfoot. I presented my claim to T. J. Beall, the guardian of the children, and he said as soon as the estate was settled up and he had funds on hands my bill would be paid. The amount was eight dollars.

Deposition of Dr. W. M. Vilas:

My residence is El Paso, Texas. Have been engaged in the practice of medicine eighteen years. Had no acquaintance with Dr. J. H. Kerfoot till I was called to see him on the night of the 14th of January, 1894. He was living near the Texas and Pacific depot at that time. I met him and his wife there. He introduced
54 himself to me also his wife. That was about 1 o'clock at night. Saw him next about 9 o'clock the next morning. There were two or three children that I saw. A baby and I think two older ones. My last visit to Dr. Kerfoot was made on the 21st of Jan., 1894. My prognosis of his case was that he would die and could only live a very short time under the circumstances. He had organic heart disease. When I last saw him his feet and legs were much swollen and dropsical. His mind was as clear and rational as I suppose it ever was. There was no affection of his mind at all.

(On my second visit, which was in the morning, he asked me if I was acquainted with Capt. Beall. I told him I was. He then gave me a letter from the Grand Commander of the Knights Templar of the State of Missouri, and asked me if I would give it to Capt. Beall in person. Also to tell Capt. Beall that he would like for him to come to see him as he had some business affairs which he wished him to attend to. I carried out his request.

Q. Did you, or not, know the contents of the letter at the time you delivered it to me?

A. Yes sir. He gave me the letter to read and I read it.

Q. Do you remember the substance of the contents of the letter, if so state it?

A. Yes sir. It was simply a letter of introduction to Capt. Beall, introducing Dr. Kerfoot to Capt. Beall as a brother Knight Templar in good standing, etc. The way he happened to show me that letter was that I had on my badge and he said "I see you are a brother Knight Templar," and showed me that letter to show that he was also a Knight Templar.

Q. Was, or not, Dr. Kerfoot buried by El Paso Commandery of the Knights Templar?
A. Yes sir.)

Plaintiff objects to all the foregoing testimony, questions and answers in parenthesis respecting the Masonic relations of the parties as irrelevant, incompetent and immaterial. The court over-
55 ruled plaintiff's objection and permitted said testimony to be read. To which ruling plaintiff excepted at the time.

Cross-examination:

I have never been paid for my services in attending upon Dr. Kerfoot during his sickness. I have never been promised payment directly. My agent may have received such a promise. I never made out a bill for my services, but I think my agent did. I don't know whether the woman Dr. Kerfoot introduced to me was his wife or not.

Deposition of A. KIPLAN:

I am acquainted with Dr. W. M. Vilas. I am keeping his books and doing his collecting. I hold for him a claim for his services rendered to Dr. J. H. Kerfoot during his last sickness amounting to about $32.50. I presented the claim to T. J. Beall. I think Judge Beall stated that it would be paid when the estate was settled, or something like that. I don't know whether he recognized the claim or not. I think he said there were some horses to be sold and something about there being a law suit that stopped him from paying or something like that. That was the third or fourth time I spoke to him about it. I don't know what was the matter of the horses being sold had to do with paying the claim. If I remember right he said when the horses were sold the claim would be paid, something like that.

Defendant then offered to read in evidence the deposition of Mona A. Kerfoot, the alleged wife of J. H. Kerfoot, deceased. Plaintiff objected to the same for the reasons: 1st. That while plaintiffs deny that she is the wife of Jas. H. Kerfoot, deceased, or was his wife, defendants contend that she was the wife of said J. H. Kerfoot, deceased, and if their contention be true then she is incompetent as a witness to testify to the matter in her said deposition contained, for the defendant, under the statutes of the State of Missouri. 2nd. In her said deposition she attempts to detail conversation had between her and said J. H. Kerfoot, deceased, at the time she says they were husband and wife. 3rd. Plaintiff especially objects to that
56 part of said witness's deposition wherein she attempts to detail a contract of marriage between her and said Jas. H. Kerfoot, deceased, for the reason that she is a party to the contract in suit in issue and on trial in this case and a party defendant in this suit and a party in interest. And Jas. H. Kerfoot being dead she cannot testify, and is incompetent as a witness to testify, to any conversation or agreements between her and said J. H. Kerfoot or testify to any acts or declarations of said J. H. Kerfoot to her or others in

her presence and especially the contract or conversation in regard to their marriage. The court overruled plaintiffs' objection and permitted said deposition to be read. To which action and ruling plaintiffs excepted at the time. Which deposition is as follows:

My name is Mona Kerfoot. Age, 34 years. Residence, El Paso, Texas. Have resided there three years. I knew Dr. J. H. Kerfoot. He died at El Paso, Texas, Feb. 4th, 1894.

(Q. What relationship, if any, did you sustain to Dr. Kerfoot during his life time?

A. Wife.

Q. Whose wife?

A. Dr. Kerfoot's.

Q. When and where did you become his wife?

A. In Los Angeles, Cal., Dec. 18th, 1889.)

I was present with Dr. Kerfoot during his last illness and at the time of his death. He died at his residence, 303 Ochoa street, El Paso. Drs. Vilas, Justice and Beall attended him in his last illness. Dr. Vilas called to see him about Jan. 10, 1894. He treated him about a week. T. J. Beall was called to see him about the 14th of January. Dr. Vilas was his attending physician. T. J. Beall was called to transact some business. Dr. Kerfoot sent for Capt. Beall. He had notes he wished to deliver to Capt. Beall. I was present when the notes and documents were deliaered to Capt. Beall about the 17th of January, 1894. I remember what notes were delivered
57 first. One was the Rule note for $7000, the other two were Stanton notes for $250 each.

(Q. What was said, if anything, about the papers at the time the Rule note was delivered to me?

A. He said, "Capt. Beall, I wish to assign this note to you. My children's names were on the note." Dr. Kerfoot took a pencil and marked through the children's names. He then wrote T. J. Beall.

Q. What instruction, if any, did he give me or what did he say in reference to the Rule note?

A. He said, "I owe Dr. Patton, of Trenton, Mo. $1000. The First National Bank of Trenton, Mo., $500. Out of this money when you collect it, I want you to pay these debts. The rest I want you to use at your own discretion in defending my children in their property that I have given them."

Q. Was there or not any mortgage given to secure the note?

A. There was.

Q. What if anything did Dr. Kerfoot say with reference to that mortgage?

A. I can't remember just what he did say about the mortgage. I remember he said bring a notary public.

Q. State whether or not a notary public was brought or came there, and who it was, if you know?

A. A notary public was brought. Mr. Lackland, cashier of the State National Bank.

Q. State whether or not Dr. Kerfoot deliver- to me any other documents. If so, when and what were they if you know?

A. Two or three days later there were other papers delivered to Capt. Beall. They were deeds and notes.

Q. Where were these notes and deeds, to which you have referred, at the time they were delivered to me?

A. They were in a tin box on the corner of the book case.

58 Q. Who, if any one, got them out of the box and handed them to me?

A. I did.

Q. At whose request?

A. Dr. Kerfoot's request.

Q. Did you, or not, know what notes and deeds at that time were delivered to me? If so, state what they were.

A. I do. One note was a Stanton note, C. Q. Stanton, of San Diego, California. Another note by John Sorrenson. Another note by Mr. Smith of El Paso, Texas. Three other notes by Mr. Wardner, of San Diego, California. One deed to property in El Paso. Two deeds to property in Trenton, Mo., another deed to property in *in* San Diego, California. Another deed to a ranch in Riverside county, California. That was all, I believe.

Q. State, if you know, the shape in which these deeds were at the time they were delivered to me?

A. They were in envelopes addressed by Dr. Kerfoot to the recorder of deeds in each county where they were to be sent.

Q. Do you, or not, remember how they were addressed, that is, whether in ink or pencil, if so, state how they were addressed?

A. They were addressed with an indelible pencil.

Q. Who took the deeds and notes from the box and delivered them to me?

A. I did.

Q. At whose request?

A. Dr. Kerfoot's request.

Q. State whether or not these last notes and deeds to which you have referred were delivered to me before or after Dr. Beall arrived?

A. They were delivered two or three days before Dr. Beall's arrival.

Q. State whether or not there was any circumstance by which you fixed the time when Dr. Beall arrived. If so, what was it?

59 A. Dr. Justice was attending Dr. Kerfoot, and on the day Dr. Beall arrived Dr. Justice left El Paso for New Orleans?

Q. When did Dr. Justice leave for New Orleans?

A. 31st day of January, 1894.

Q. State whether or not Dr. Kerfoot was aware of his condition and whether he said anything as to whether he would get well or die. If you can, state what he said on that subject, and when he said it?

A. He was aware of his condition. He said, "Dear, I will never get well." He said that some three or four days before Dr. Beall came.

Q. Did he at any subsequent time say anything else on that subject? If so when and what did he say?

A. He did. On the day of Dr. Beall's arrival I looked out of the window and saw Dr. Justice and Dr. Beall coming. I said to him, "Dr. Beall is coming." He said, "He can come, but he can't do me any good."

Q. State since the 18th of December, 1889, whether or not you have lived with Dr. Kerfoot as his wife?

A. Yes sir, I have.)

I have borne him three children since that time. We lived in California about four months after our marriage. We lived in Los Angeles, California. Kept house. While living there I was visited by persons and introduced to them by Dr. Kerfoot as his wife. Was visited by Mr. and Mrs. McCrabb, Mr. and Mrs. Capt. Parsons, Mr. Isaac Parsons, Mrs. Eason, Mrs. McIntyre, Mr. and Mrs. Vandercock, that is all I remember. We went there intending to make California our home. Went from Los Angeles when we left there, to Kansas City. Dr. Kerfoot went with me. We remained in Kansas City that time four months. Then went to National City, California. Kept house there. When we went back to Kansas City we returned to look after our interests, not to live. When we went back to National City Dr. Kerfoot took a car load of horses, a buggy,
60 carriage and household furniture. We lived at National City about six months. Went from there to Kansas City, Kansas. Dr. Kerfoot moved from California because the climate did not agree with his health. Came to El Paso to live in January, 1892. Dr. Kerfoot came in advance of me. I arrived in three or four days after his arrival. Probably a week. We stopped at the Pierson Hotel. Dr. Kerfoot did not meet us at the depot. He sent a carriage. He received us at the hotel. I was recognized by him and introduced to the guests at the hotel as his wife. After we left the hotel we lived on Myrtle street. Rented a furnished house and kept house. While living there I was recognized by Dr. Kerfoot and introduced by him to visitors as his wife. From there we moved to Kansas City, Kansas. We went there to look after our interests. We returned to El Paso in January, 1893. Lived at our home, 303 Ochoa street, where Dr. Kerfoot died. Dr. Kerfoot recognized me as his wife and introduced me as such to persons visiting there. The names of my children by Dr. J. H. Kerfoot, and ages, are Hervey 10 years old, Alwilda 8, Lester R. 4, John R. 1. I do not remember the name of the doctor that attended me at the birth of the first one. Dr. Kerfoot attended me at the birth of the others. The last children were twins. One of them died. They were two months old when Dr. Kerfoot died. Afterwards moved to the house — I now live. Dr. Kerfoot was there continuously except one day. Up to the time of Dr. Kerfoot's death since the 18th day of December, 1889, I never heard from him or any other person that he was married to any other woman than myself. I first heard that he was married to a lady by the name of Clara Kerfoot, some time after Dr. Kerfoot's death. Capt. Beall said that he had been informed that such was the case.

[Q. After the birth of your second child, Alwilda, state what if anything occurred between yourself and Dr. Kerfoot with regard to continuing to live with him as you had hitherto done?

A. I refused to live with him any longer. He then said we would go to California and get married. He said we could go there and get married without publicity.

61 Q. Did he afterwards take you and the children to California after you had refused to live with him?

A. He did.

Q. When you reached California state what he did and what was said with reference to the promise made you?

A. He said now we will agree *to* each other to be man and wife. In the presence of our children we did.

Q. What if anything did he say in reference to that form of marriage.

A. He said that form of marriage in California was legal.]

(Plaintiff again objected to the foregoing questions and answers inclosed in brackets and asked to have them excluded for the reasons that a mere conversation or agreement between the parties could not under the circumstances constitute a marriage, and for the reason that the marriage between Dr. Kerfoot and the witness is a matter directly in issue and to be determined on the trial of this cause. That the witness being a party in interest in this suit and a party to said marriage agreement, if such occurred, cannot testify thereto, as Dr. J. H. Kerfoot, the other party to that agreement, is shown to be dead. And the testimony of the witness is not sufficient to establish their marriage, if otherwise competent. The court again overruled plaintiffs' objection to the introduction of said testimony and admitted the same. To which action of the court plaintiffs excepted at the time.)

After said time I lived with Dr. Kerfoot and was recognized as his wife by him and introduced to persons as such up to the time of his last illness. He always treated me and the children affectionately and kind. He treated Hervey very kindly and had Hervey with him always when he went out or went away from the rest of us. He always took Hervey. Hervey was his favorite. Alwilda goes by a pet name "Bay." In correspondence with me Dr. Kerfoot had a pet name or short name. He used "Pam." I received letters from Dr. Kerfoot in reference to the notes and deeds to the children.

62 These are the letters handed to me. I received them about Oct. 5th, 6th and 7th, 1893. One of them I received about Nov. 7th, 1893. They were addressed to me at Kansas City, Kansas, where I was at that time. They were written from El Paso, Texas. I am acquainted with Dr. Kerfoot's handwriting. These letters were in his handwriting. (These letters were marked A, B, C and D, attached to my deposition.) When I lived with Dr. Kerfoot prior to our marriage in Kansas City, Kansas, he went by the name of M. E. Hervey. And I assumed the name of Hervey. We lived together under that name until I refused to live longer with him in Kansas City, Kansas. After we reached California and agreed to be husband and wife on the 18th of Dec., 1889, we were known under the name of Kerfoot. I was known and received among my friends as Mrs. Dr. Kerfoot. Since the date of said marriage I have

never been introduced or referred to under any other name by Dr. Kerfoot than Mrs. Kerfoot, his wife. I thought I had been married prior to the time I first met Dr. Kerfoot. I found afterwards that I had not. I thought I was married. I found the marriage that was performed was a mock marriage. I learned also that the man was a married man and had a wife then. I had two children by this man to whom I refer. I was twenty years old at the time. His name was Frank Earle, or I married him under that name. He was between forty-five and fifty years old. He represented himself to be a single man. I lived with him nearly three years before I found he was married. He was away from me then. I wrote and told him what I had learned and that I would not live with him any more. I never heard from him again. I delivered to you, T. J. Beall, the notes and deeds referred to in my testimony at the request of Dr. Kerfoot, in his life time, for his children. He delivered to me for his children a mortgage on property in Kansas City, Kansas, for $2000. This note was given to John Ryan by Dr. Kerfoot, that is, the note was payable to John Ryan and was secured on property in Kansas City, Kansas. A bill of sale was given to me by Dr. Kerfoot for his children in his life time for some cattle, horses, buggies and carriages situated in Riverside county, California.

63 I put them, the bill of sale and notes, in the parlor desk drawer and locked them up and kept them there until I started to California, and then delivered them to Capt. Beall. Dr. Kerfoot did not leave any will.

Cross-examination:

I was married to Frank Earle in Eagleville, Mo., Oct. 12, 1879, by a justice of the peace. I do not remember his name. I don't know whether Frank Earle is living or not. Last saw him in April, '82. Last heard from him in April, '82. I did not leave him. He left me. I never got a divorce from him. I went to California first from Kansas City, Kansas. Went to California more than one time during Dr. Kerfoot's life time. First went in Dec., 1889, to Los Angeles, California, then in 1890. Stayed in California the first time four or five months. Stayed in Los Angeles four or five months. Lived in Los Angeles. On the 18th day of December, 1889, lived at hotel called Hoffman House. Don't know the name of the proprietor. Got there Dec. 18th, 1889, in the afternoon. Dr. Kerfoot and my two children were with me. Went directly from Kansas City, Kansas, to Los Angeles. I had a conversation with Dr. Kerfoot in Los Angeles about *or* marriage, as well as I can remember between seven and eight in the evening, after the lamps were lighted.

Q. What did he say to you?

A. He said, we will now agree—he said, "I now agree to be your husband through the rest of my life." That was all of his language.

Q. What did you say?

A. I now agree to be your wife through life.

Q. Is that all you said?

A. In the presence of our children, I said.

Q. State whether or not that is the only agreement of marriage you ever had with Dr. Kerfoot?

A. Yes sir, it was.

Q. Was there no one present but yourselves?

A. There was not.

64 Q. Did you ever afterward tell anyone before this litigation arose or before Dr. Kerfoot's death, that you had such an agreement with him?

A. Yes sir, I did to Capt. Beall.

Q. When did you tell Capt. Beall?

A. Soon after Dr. Kerfoot's death.

Q. I asked you as to statements before his death?

A. No, I never did. I misunderstood the question.

My child Hervey was born Feb. 12th, 1885. Alwilda was born Jan. 20th, 1887. Lester was born Sept. 23rd, 1890. Hervey was born in Rosedale, Kansas. Alwilda and Lester in Kansas City, Kansas. The only other living child is John Kerfoot, of Dr. Kerfoot's children. I have one other child living, Bertie Earle. He lives in Missouri. At the time of my alleged conversation with Dr. Kerfoot, my child Hervey was the oldest person present besides myself and the Dr., and he was not five years old. Before I went to Kansas City, Kansas, to live with Dr. Kerfoot, prior to my removal or visit to California, I did not live at any other place with him. I first commenced to live with him in 1887, no in 1885. Lived with him in 1885 in Rosedale, Kansas. Lived with him there four or five months then went to Kansas City, Kansas, to the corner of 4th and Jersey streets. Dr. Kerfoot did not go with me there. He was there when I went. He did not live with me there continually. He was there now and then. I knew Dr. Kerfoot's first wife. Became acquainted with her in Jan., 1885. I made a mistake again, it was in Jan., 1884. Dr. Kerfoot's first wife died, as I was informed, in the spring of 1886. He took up his permanent residence with me in Kansas City, Kansas, in the fall of 1886. He went by the name of Dr. M. E. Harvey, sometimes Dr. Harvey. I also went by the name of Harvey. Called myself Mrs. Harvey. I and Dr. Kerfoot held ourselves out in Kansas City, Kansas, from the time we went there until Dec., 1889, as Dr. and Mrs. Harvey. We said that Harvey was our name but we didn't say that we were husband and wife. Dr. Kerfoot did not introduce me as Mrs. Harvey. He

65 did not introduce me at all to anyone while we lived there. I may have introduced myself but don't remember doing so. When Dr. Kerfoot referred to me in conversation with any one else in my presence he referred to me as Mrs. Harvey, sometimes by my name. He did not frequently refer to me in conversation with others as Mrs. Harvey. He never introduced me to anyone on the train or elsewhere while traveling. We held ourselves out as Mr. and Mrs. Harvey during all the time we lived at the corner of 4th and Jersey streets, in Kansas City, Kansas. We would naturally have to. I never talked with any lawyer about the matter of our marriage before Dr. Kerfoot's death, or about having an agreement with him respecting our marriage. Since his death I have talked with Capt.

Beall, the attorney here. Never talked with him about what it would take or require to constitute a common law marriage. Capt. Beall asked me if Dr. Kerfoot and I were married. I told him yes, and where and how. He merely nodded his head. I told him what Dr. Kerfoot had said about that being a legal marriage. He didn't say anything then. He went away from the house. Said he had looked up the law on the subject and found it to be a legal marriage. Didn't tell him just the words. Told him that we agreed to each other to be husband and wife. That was soon after Dr. Kerfoot's death. It was then that he came to me and told me that he heard that Dr. Kerfoot had married in 1891 or in 1892, I don't remember now, to Clara A. Kerfoot. I then told him it couldn't be possible and I could not believe it. That conversation was probably two weeks after Dr. Kerfoot's death. I know that Capt. Beall, as guardian of my children, had a settlement with Clara A. Kerfoot, in 1894, in regard to her claims. I don't know just what the settlement was. Capt. Beall advised with me about it. I told him to settle the matter the best he could to save any more publicity. I don't think we just exactly agreed upon the amount that we paid to Clara A. Kerfoot. I told him to use his own judgment in settling the matter. Don't think we discussed the matter of
66 the amount. He said he agreed to pay her $4000. I didn't sanction the agreement. I told him to use his own judgment. I made no complaint about his settlement with her. Capt. Beall made no report respecting the time when Clara A. Kerfoot and Dr. Kerfoot were married. He just simply said that he heard they were married in 1891 or 1892. I don't remember which it was. After the 18th day of Dec., 1889, we remained in California four or five months to the best of my recollection. We went from there to Kansas City, Kansas, to 1614 N. 4th street. He stayed there till Oct. 1889. We went by the name of Harvey during that time. It was right in the same yard where we had lived before. We lived there as Mr. and Mrs. Harvey. While in California on our first visit after Dec. 18th, 1889, we did not live in any place besides Los Angeles. Remained there all the time while we were in California. When we left Kansas City, Kansas, the second time in Nov. 1890, we went to National City, Cal. Stayed there about five months. Lived in a Mr. Stacey's house. A two-story frame. Went by the name of Kerfoot there. From National City we went back to Kansas City in May, 1891. I stayed there till the next January. He stayed till the last of October or the first of November. We went by the name of Mr. and Mrs. Harvey, in Kansas City, Kansas, during that time. Dr. Kerfoot and Hervey went to California from there. I met him in January, 1892, at the Pierson Hotel, El Paso. Stayed there about a month. Went by the name of Mr. and Mrs. Kerfoot. Went from the Pierson Hotel to a furnished house of Mrs. Mathews' on Myrtle street. Stayed there until May, 1892. Went from there to Kansas City, Kansas. I stayed there until the next December. He stayed about a month. We went by the name of Mr. and Mrs. Harvey in Kansas City, that time. Lived at 1614 N. 4th street. Went from there in Dec., 1892, to El Paso, Texas. Have gone by the

name of Kerfoot in El Paso, Texas, since the first time we came here. Dr. Kerfoot built the house where I now live. I don't know why he took the title to the lots in the name of John Ryan. He had Ryan execute the deed to the property to the three children because he said he wanted his children to have what he had when he was dead. He had the two thousand dollar note I have men-
67 tioned transferred by John Ryan to the children and the other transfer of the notes mentioned as well as the other property made to the children and left with him, Dr. Kerfoot, because he wanted them to have what he had.

Q. When?

A. When he was dead. I can remember exactly what Dr. Kerfoot said on the occasion when we said we agreed to marry in Los Angeles, from memory entirely. The language was, "I now agree to be your husband through life." My exact language was, "I now agree to be your wife through life in the presence of my children." It is not true that after that conversation we went on living together just as we had before that time. I said we went to living as Mr. and Mrs. Kerfoot. Before that time we lived as Mr. and Mrs. Harvey. After that time we lived together as Mr. and Mrs. Harvey in Kansas City, Kansas. We could not very well go back and live where we had lived as Mr. and Mrs. Harvey and say there that our name was Mr. and Mrs. Kerfoot. When we were in Kansas City, Kansas, we went by the name of Mr. and Mrs. Harvey and in California and Texas we went by the name of Mr. and Mrs. Kerfoot. In Kansas City, Kansas, people knew that we were Mr. and Mrs. Harvey because when we first went there we said our name was Harvey. In California people knew that we were Mr. and Mrs. Kerfoot because we were Mr. and Mrs. Kerfoot. I don't know how we announced ourselves when we first went to the hotel in Los Angeles in Dec., 1889. I went to our room. Dr. Kerfoot did the registering if there was any done. There was no agreement or understanding before we went to the hotel about what name we should call ourselves. We did not call ourselves or introduce ourselves to anyone at the hotel at that time by any name. I know there was a deed in The First National Bank of Trenton, Missouri, to Hervey, Alwilda and Lester Kerfoot. Dr. Kerfoot transferred the real estate to the bank in Trenton in order that it might be transferred to the three children by the bank. He told me that was his purpose. The deed was executed by the bank and given to Dr.
68 Kerfoot for the children because he wanted the children to have that property.

Q. When?

A. When he was dead. I know about a deed from Mr. Rule to the three children mentioned covering certain property in Trenton, Missouri. Dr. Kerfoot transferred the property to Mr. Rule, and received the deed from Mr. Rule to the three children because he wanted the children to have the property.

Q. When?

A. When he was dead. Aside from this property about which I have testified Dr. Kerfoot left no other property that I know of ex-

cept a half interest in a house and lot in San Diego, Cal. Our first child Hervey and our second child, Alwilda, were born before we left Kansas City, Kansas, the first time, and Dr. Kerfoot's first wife had then been dead several years. We were not married before we went to California because we wished to avoid publicity. That was our only reason. That was our only reason for our secred agreement in Los Angeles, Cal., on Dec. 18th, 1889, respecting our marriage. Before we went he said we could go there and be married without any publicity. We feared the publicity because our children were good big children and there would naturally have to be a record if we were married otherwise. It was not our purpose to conceal our marriage from our children. The only good the absence of a record would do was they would naturally know their age and then see the record of our marriage. The only reason I can give, the only explanation I can make or the only reason that I know for the secret agreement about which I have testified was, there was our children great big children and our friends. If we got married publicly they would naturally wonder where these children came from. My maiden name was O'Neal. The house where we lived in Kansas City, Kansas, on the corner of Jersey and 4th streets was purchased by Dr. Kerfoot.

Redirect:

We stopped at the Hoffman House when we first went to
69 California from the 18th to the 21st or 22nd of Dec. 1889. Then went to East Los Angeles. Rented a house and furnished it ourselves. Lived there until April or May, 1890. I don't know how long it was after the execution of the note and deed that Dr. Kerfoot told me that he had them transferred to his children as he wanted them to have the property at his death, but I think it was immediately after he got them all fixed up. He wrote me the letters attached to my deposition.

The letters referred to in the deposition are as follows:

"A."

EL PASO, *Oct. 2nd.*

DEAR BAM: I am a little better but my cold seems to be pretty deep. I manage to keep up. I must see you all soon. I try not to think about it any more than I can help. Have not heard from John. He should be here today or tomorrow. The weather is splendid but a little too warm. I have got my deeds all made and sent off to be recorded. I deeded Miller house and two houses in San Diego to Rule. He is to make deeds back to children and send me at once. John got here at 3 this p. m. I was awful glad. I had so much to do and felt so badly. He is quite well. Hervey was delighted to see him. I shall keep real quiet for a few days and try to get well so I can do something. I must be there or have Bay or Lester here very soon. Will tell you more in next letter. Don't let Bay go anywhere among negroes. She is a lovely darling. I shall stick to her. I wrote you about the deeds, they are all made, but have not heard from them yet. Cook should have sent his by

this time. If I don't hear from him will wire. I shall feel so good when they are all fixed and no one can bother anything I have given to my precious little darlings. Tell Lester he shall see pa soon and tell Bay pa will send or come for her soon. I will send you some money in a few days as I don't want you to get out. I hope this will find you well. Write soon to me.

JAMES K.

70 "B."

EL PASO, *Oct.* 26.

DEAR BAM: I send Bay on Santa Fe train to Missouri. She will be in palace car with colored man Miller, the porter. He is a nice kind of man. He was on same train with us as we went out. I will go with her up to Los Angeles and see her well started and I will come back on next train. She cannot go to school here and Hervey can go half day only. I would not give a cent for such a place to raise children. I will send the man and woman to San Jacinto. First of week have John come here and I think now I will be back there in about two weeks if weather not too bad. But I will take children to Los Angeles soon as possible where they can learn something. They can do nothing here. If I was in a good place I would have teacher for them. The old negro woman came round as she thought I was here. I would not talk to her. She inquired for you. I would have nothing to do with her. I send a deed in this which I wish you to keep, and some other papers which you may keep. I may need them and may not. I have sent deed to Cook and when deed comes back to children I will deposit all with Stanton or Davis, Beall & Kemp. So if anything happens to me they will have it. I have assigned all my notes to them. Rule $7000, Stanton $2500, Sorrenson $1900, M. W. Stanton $500 and when I get notes for property just sold.

This was all the evidence offered.

On the 22nd day of August, 1895, the court found the issues for defendants, and dismissed plaintiffs' petition.

On the 22nd day of August, 1895, and within four days after said finding, plaintiffs filed their motion for new trial, as follows:

Motion for New Trial.

Come now the plaintiffs in the above entitled cause and move the court to set aside the verdict and finding of the court in said cause and grant them a new trial for the following reasons:

1. The verdict and finding is against the evidence and against the weight of the evidence in said cause.

71 2. The court admitted illegally and incompetent evidence on behalf of the defendants, contrary to the objections and exceptions of the plaintiff.

3. The court excluded competent and proper evidence offered by the plaintiffs.

4. The court erred in admitting the testimony of defendant, Mona Kerfoot, as to the marriage contract between her and James H. Kerfoot. Said Kerfoot being dead she was disqualified as a witness to prove said alleged contract, she being a party thereto.

5. The court misconceived, and erred as to, the law in the case.

6. The verdict and finding of the court should have been for the plaintiffs under the law and the evidence in this case, instead of against them.

7. The verdict and finding of the court were against the law in the case.

Which motion being overruled, plaintiffs excepted to the ruling of the court at the time. And afterwards, on the same day, plaintiffs filed their motion in arrest of judgment, as follows:

Motion in Arrest of Judgment.

Now comes the plaintiffs in the above entitled cause and move the court to arrest the judgment in this cause for the reasons:

1. That upon the face of the records said judgment is erroneous.

2. That the answers in said cause fail to state facts sufficient to constitute any valid defense to plaintiffs' cause of action.

3. That under the law and the facts as shown by the records said judgment should have been for the plaintiffs instead of for the defendants.

4. The court erred in overruling plaintiffs' motion for a new trial.

72 Which motion being overruled, plaintiff excepted to the ruling of the court at the time, and appealed from the judgment of the court.

Respectfully submitted,

GEO. HALL & SON AND
MILLARD PATTERSON,
Attorneys for Plaintiffs.

73 In the Supreme Court of Missouri, Division No. —, April Term, 1898.

No. 8191.

HOMER HALL, Adm'r of Estate of J. H. Kerfoot, Deceased, and Robert Earl Kerfoot, by Next Friend, Homer Hall, Appellants,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK of Trenton, Mo.; Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Respondents.

Appeal from Circuit Court of Grundy County.

Hon. P. C. Stepp, Judge.

Geo. Hall & Son, and Millard Patterson, Attorneys for Appellants.
Harber & Knight and Thomas J. Beall, Attorneys for Respondents.

Appellant's Brief, Points and Authorities.

I.

Before the deed from James H. Kerfoot to The First National Bank could take effect or pass the title to the Bank, it, by its legally authorized agent, must accept the same, and there is no evidence that R. M. Cook had authority to accept this deed or that it was accepted. Ebersole v. Rankin, 102 Mo. 488; Brandon v. Carter, 119 Mo. 572 Op. 582; Cravens v. Rossiter, 116 Mo. 338; Roberts v. Moseley, 51 Mo. 282; Rogers v. Carey, 47 Mo. 232; Renfro v. Harrison, 10 Mo. 412; Ells v. Mo. Pac. Ry. Co. 40 Mo. App. 165; Armstrong v. Morrill, 81 U. S. 120-20 L. C. P. 765, 770; Winsor v. Lafayette Co. Bank, 18 Mo. App. 665; United States v. City Bank of Columbus, 21 Howard 256; Book 16, page 130 L. C. P. Co. Morse v.
74 Mass. National Bank, 1 Holmes U. S. C. C. 209; Bank of United States v. Dunn, 6 Peters 51; Morse on Banks and Banking, 152; Thompson on Corporations, Vol. 4, §§4754, 4761, 4951; The Western National Bank of New York v. David Armstrong, Receiver of Fidelity National Bank, 152 U. S. S. C. 346; Matthews v. Skinker et al. 62 Mo. 329, 98 U. S. 621.

And said bank could not under the laws of the United States or of the State of Missouri, receive, hold or convey said real estate for that purpose. U. S. National Banking Act, Sects. 5136 and 5137. R. S. of Mo. of 1889, Sect. 2508, Laws of 1893, p. 128; Blair v. Perpetual Ins. Co. 10 Mo. 560.

II.

There was no legal delivery of either the deed from J. H. Kerfoot to the First National Bank or the pretended deed from the Bank to defendants Hervey, Alwilda and Lester R. Kerfoot. Cravens v.

Rossiter, 116 Mo. 338; White v. Pollock, 117 Mo. 467; Sneathen v. Sneathen, 104 Mo. 201; Standiford v. Standiford, 97 Mo. 231; Tobin v. Bass, 85 Mo. 654; Huey v. Huey, 65 Mo. 689, Op. 692; Turner v. Carpenter, 83 Mo. 333; Hammerslough's v. Cheatham, 84 Mo. 13; Tyler v. Hall, 106 Mo. 313; Hall v. Hall, 107 Mo. 101; Richardson v. Gray, 52 N. W. Rep. 10 (Iowa) Cazassa v. Cazassa, (Tenn.) 22 S. W. Rep. 560; Hutton v. Smith, (Iowa) 55 N. W. Rep. 326; Colyer v. Hyden, (Ky) 21 S. W. Rep. 868.

III.

The deed made by C. H. Cook, as Vice-President of the First National Bank, to defendants, Hervey, Alwilda and Lester R. Kerfoot, was unauthorized by the board of directors of the bank and was void. Burris v. Bank of Buffalo, 70 Mo. App. 675; Winsor v. Lafayette Co., Bank, 18 Mo. App. 665; and cases cited; McKeag v. Collins, 87 Mo. 164; First National Bank of Central City v. Lucas, 31 N. W. Rep. 805; Luse v. Isthumus Transit Ry. Co., 25 Amer. Rep. 506; Fleckner v. President, etc., 8 Wheat 338, 360; Bank v. Dandridge, 12 Wheat. 64; Leggett et al. v. N. J. Manufacturing and Banking Co. 23 Am. Dec. 728 and note; 4 Amer. and Eng. Ency. of Law 1st Ed. 238; Devlin on Deeds, 1st Ed. 335-338-340; R. S. of 1889, Sect. 2399; Thompson on Corporations, Vol. 4, §4761; North Star Boot and Shoe Co. v. Stebbins, 48 N. W. R. 833;

75

The acknowledgement of the deed is insufficient. R. S. of 1889, Sect. 2408; Eppright v. Nickerson, 78 Mo. 482.

IV.

James H. Kerfoot being dead, the defendant, Mona Kerfoot, was incompetent to testify to any marriage agreement or any conversation between them. R. S. of 1889 of Mo. Sect. 8918; O'Bryan v. Allen, 108 Mo. 227; Chapman v. Dougherty, 87 Mo. 617; Meier v. Thieman, 90 Mo. 433; Hopkins v. Bowers, 16 S. E. Rep. 1; Leach v. McFadden, 110 Mo. 584.

And the letters from James H. Kerfoot to Mona Kerfoot, defendant, were incompetent. State v. Ulrich, 110 Mo. 350; Brown v. Brown, 53 Mo. App. 453.

V.

The attempted conveyance not having been completed in the life time of James H. Kerfoot, his death revoked all that had been done towards the conveyance and the property reverted to his legal heirs. 8. Amer. and Eng. Ency. 1313; Tomlinson v. Ellison, 104 Mo. 105; Helfenstein's Estate, 18 Amer. Rep. 449; Richardson v. Hadsall, 106 Ill. 476; Lambert v. Overton, 13 W. R. 227; Appeal of Walsh, (122 Pa. S. 177) 9 Amer. S. Rep. 83; Thweatt v. McCullough, 5 Amer. S. Rep. 391.

Assignment of Errors.

I.

The court erred in admitting illegal and incompetent evidence on the part of defendants, especially the evidence of defendant Mona Kerfoot, and as to letters of James H. Kerfoot, deceased, to her.

76 II.

The court erred in finding the issues for defendants and against plaintiffs, and rendering judgment thereon.

III.

The court erred in overruling plaintiff's motion for a new trial, and in arrest of judgment.

Statement.

This is an action brought to set aside a deed from James H. Kerfoot, deceased, to the defendants, the First National Bank of Trenton, Missouri, dated October 28, 1891, and a deed from Charles H. Cook, as Vice-president of said First National Bank, to defendants, Hervey, Alwilda and Lester R. Kerfoot, to a part of lot 6, block 29, in Trenton, Mo., and for the recovery of the possession of said premises.

James H. Kerfoot was a physician and resided with his family, in Trenton and on his farm, adjoining, from about the year 186– to about the year 1891. His family consisted of himself, his wife Margaret, and his four children—Walter, Robert H., Elizabeth and Theda. Walter died about 1875, was about 14 years old when he died. Lizzie died about 1880; Theda in 1885. None of whom left any heirs. The wife and mother died in the spring of 1886.

For some reason Dr. Kerfoot would not let Robert stay at home, and he left in 1883. Went to Topeka, Kansas. Married Alice B. Shade Nov. 1885. In May, 1886, plaintiff Robert Earle Kerfoot was born, the issue of said marriage. There seemed to be some trouble between him and his wife, and he came back to Trenton and died, or shot himself, at Trenton, Mo., Nov. 24, 1886, leaving surviving him as his only heir, the plaintiff, Robert Earl Kerfoot. Dr. James H. Kerfoot died at El Paso, Texas, Feb. 4, 1894. Defendant Mona Kerfoot was married to Frank Earl, at Eagleville, Mo., Oct. 12, 1879, lived with him until April, 1882, when he left her. She was never divorced from Earl. In January, 1884, she went to Trenton and lived in the family of Dr. Kerfoot, ostensibly as a
77 help. It soon became apparent that she and the Dr. were criminally intimate, and Mrs. Kerfoot made her leave. After leaving she went to Rosedale, Kansas, which was in 1885, where she and Dr. Kerfoot lived together for four or five months, and then moved to 4th and Jersey street, Kansas City, Kansas, where they lived together and went by the name of Dr. and Mrs. Harvey. The

Dr. spending a part of his time there with her, and a part of the time with his family in Trenton, playing the role of Dr. Jekyll, and Mr. Hyde, until the fall of 1886, when he took up his permanent abode with her at Kansas City, Kansas, and continued to live with her until his death, going from place to place, part of the time at Hot Springs, Ark., part of the time at Los Angeles, and at other places in California, and a part of the time at El Paso, Texas. The defendants, Hervey, Alwilda and Lester R. Kerfoot, are the fruits and issue of this meretricious alliance. Defendant Hervey was born February 12, 1885, before the death of Dr. Kerfoot's first wife; Alwilda, January 20, 1887, and Lester R. was born Sept. 23rd, 1890. Defendant Mona Kerfoot claims that she and Dr. Kerfoot were married by a secret common law marriage, at Los Angeles, California, Dec. 18, 1889. That they went direct from Kansas City, Kansas, to Los Angeles, went to their room at the hotel, and while alone in their room with the two infant children, said she had a conversation with Dr. Kerfoot about their marriage. That he said, "I now agree to be your husband through the rest of my life." That that was all of his language. That she said "I now agree to be your wife through life, in the presence of our children." That was the only marriage agreement that was ever had between them. That she never told anyone of that agreement until after Dr. Kerfoot's death, then told it to Mr. Beall, her attorney. While they lived at El Paso, Texas, they went into society, were recognized, and recognized each other as husband and wife, introduced each other as husband and wife, and Dr. Kerfoot manifested great affection for said defendant and her children, and they for him But to others and at other places Dr. Kerfoot claimed to be a widower. Told Mr. Fred K. Rule,
78 of Los Angeles, Cal., in July 1891, that said defendant was his housekeeper that he had brought out from Missouri with him. He did his banking business at Kansas City, Mo., with the National Bank of Commerce of that city—made the bank his loafing place. Said his wife was dead—claimed to be a widower. Advertised for a housekeeper and gave Mr. A. W. Rule, the cashier of the National Bank of Commerce, as a reference. Mr. Harry Crain, one of the tellers of the bank, as a Notary Public took his acknowledgement to a number of deeds, in which he said he was single and unmarried. And in the fall of 1890 was keeping company with an aunt of Mr. Crain's. Mr. Luther Collier, an attorney and Notary Public at Trenton, Mo., in taking his acknowledgement to a deed, on August 12, 1890, asked him if he was single and he said he was, and in a number of other deeds made by him after Nov. 18, 1889, he always acknowledged himself to be single and unmarried. He courted a Miss Clara A. Pintz, of Kansas City, Mo., procured a marriage license of the recorder of deeds of Bates Co., Mo., on the 4th of October, 1891, and was publicly married to her at Kansas City, Mo., on the 20th day of October, 1891, by R. L. Jamison, a Methodist minister. His marriage to Miss Pintz being generally known among his acquaintances, and the marriage certificate duly recorded. John Ryan, Dr. Kerfoot's body servant that lived with him for several years, was with him almost constantly, testified

that he never knew of their marriage—never heard either of them claim to be married.

After the death of Dr. Kerfoot, and after his marriage to Miss Clara A. Printz was known, and she was claiming her marital rights in his estate, the defendant Beall, by the direction and procurement of defendant Mona Kerfoot, bought Clara A.'s interest in the estate at a consideration of $4,000 and procured a deed from her, releasing all her rights in the estate of Dr. Kerfoot as his wife.

Dr. Kerfoot, with the assistance of his wife and children, while living in Trenton accumulated quite a fortune. He owned valuable real estate in Trenton, Mo., Kansas City, Kansas, Los Angeles,
79 National City, San Diego and other places in California, and El Paso, Texas, and several thousand dollars in money, notes and other personal property. Some time before his death he attempted to transfer his property to these three minor defendants, children by defendant Mona Kerfoot, by conveying the same to other parties, and they conveying it to said defendants. He executed a deed to the property in controversy to the First National Bank, defendant, through an arrangement with its cashier, and then had its vice-president execute a quit claim deed to said defendants for the property. The testimony of R. M. Cook, the cashier of the bank, and the letters of Dr. Kerfoot, are the only evidence there is as to these conveyances, aside from the deeds themselves. There is no evidence that the other officers of the bank knew anything about the transaction. Cook, the cashier, testified "that he had a conversation with Dr. Kerfoot in September, 1893, in which the Dr. told him he wanted to deed the property in controversy to the bank; and the bank to make him a quit claim deed back, and if we had no objections he would make the deeds and send to us. The reasons he assigned for making the deeds to the bank and the bank quit claiming back was, he though- I could handle the property better, or the bank could handle the property better and the assessments would be lower. He seemed to be desirous that the matter be kept quiet as to the making of the quit claim deed and did not want any action of the board of directors of the bank in the matter. The board of directors of the bank did not have anything to do with the making of this deed in any manner, or give any orders or directions about it. The matter was never brought before the board of directors at all." That C. H. Cullers was the president of the bank at the time; was at home where he lived during all the time he was president of the bank.

The defendant, The First National Bank, was occupying the property at the time of the making of these deeds, as the tenant of Dr. Kerfoot, and continued to occupy it as his tenant and to pay the rents thereafter, the same as before, up to the time of his death.

C. H. Cook had no authority from the board of directors to
80 make the quit claim deed from the bank—the matter was never brought before the board at all. The by-laws of the bank provide that the vice-president act in the absence of the president, but then only by order of the board.

On the 9th of October '93, Dr. Kerfoot wrote Mr. Cook, the

cashier, saying, "With your approval I may deed your bank the building which you are in, requesting you to at once put it on record. At some time make a quit claim deed to such of my relatives as I may wish to have the property in case of my death by accident or otherwise, holding such quit claim deed without record. If I ever should sell it I could surrender such deed to the bank and have it deed as directed by me. * * * The records would show the property belonged to your bank, which might tend to keep the assessments lower. It is now very high."

October 26th, 1893, he mailed to Mr. Cook the deeds, with a letter instructing Mr. Cook to have quit claim deed acknowledged by a Notary Public, that he could trust to be confidential, then return to him, saying, "I shall not have quit claim deed recorded at present. In case I should wish to convey the property at any time I would surrender the quit claim deed and have bank make a new one to whom I might direct. Please allow the impression to go forth that the bank is the owner." That neither the bank nor its officers got any instructions about the delivery of the quit claim deed. Nor did they give any one any instructions or authority to deliver it, so far as the evidence discloses. After the making of the quit claim deed, Mr. Cook, the cashier, sent it by mail to Dr. Kerfoot, at El Paso, Texas. A short time before Dr. Kerfoot's death the defendant Mona, by his directions and in his presence, got these deeds in controversy, with others, and delivered them to Mr. Beall, at which time the Dr. told Mr. Beall to have the deeds recorded. The deeds at the time were sealed up in envelopes, addressed to the different recorders. Mr. Beall took them out of the envelopes, and some fifteen days after Dr. Kerfoot's death, mailed them to the recorder of deeds for record. Several times after
81 the delivering of the deeds to Mr. Beall, Dr. Kerfoot asked if they had been sent away for record. Mr. Beall told him that they had been delivered and that was sufficient, that he would keep them for the children.

Defendant Mona testified on cross-examination, that Dr. Kerfoot made the deed for the property to the bank and had the bank make the deed to the three defendants so they could have the property, and on being asked when they were to have it answered, after his death.

Argument.

The appellants contend that while the warranty deed from James H. Kerfoot to defendant First National Bank is in form, it conveyed to the bank no title to the property in controversy, for the reason that it was not accepted by the bank, or by any one authorized to accept it for the bank. It was held by the Supreme Court of this state in the case of Ebersole v. Rankin, 102 Mo. 488, that the delivery of a deed to the grantee and acceptance of it by him are essential to its validity. And in order that this deed convey to the bank any title it must have been accepted by some one authorized by the bank to receive the same. See also the case of Cravens v. Rossiter, 116 Mo. 338, where it is held that the delivery

of a deed in order to convey the title requires the assent of the grantee and until he assents to the delivery no title will pass.

In the case of Armstrong v. Morrill, 81 U. S. 120, the court in the opinion by Justice Clifford, says: "Authorities are hardly necessary to show that the mere making of a deed of trust, like the one in question, without any acceptance, expressed or implied, by the trustee, is not sufficient to vest in the trustee the title to the land mentioned in the deed, and that parole proof is admissible in such a case to show that the trust was never accepted. * * * Offered as the paper writing was, not as the release of a vested right, but merely as evidence tending to prove that the signer never accepted the trust created by the deed, no doubt is entertained that the evidence was properly admitted as it is well settled law
82 that every conveyance which depends upon the acts of the parties is imperfect for vesting the title, without the assent of the parties to the same, either express or implied. Smith v. Wheeler, 1 Vent. 128."

From the evidence in this case it is clearly apparent, as shown by the letter of Dr. Kerfoot, accompanying these deeds, that he appointed or attempted to appoint the First National Bank his agent, or trustee, for the purpose of enabling the bank to transfer the title of the property to these three defendants, Hervey, Alwilda, and Lester R. Kerfoot, or to hold the legal title and convey the same to such persons as he might sell the property to, at some time in the future. In other words, this warranty deed was intended to take the place of a power of attorney, and before it could take effect, the bank by its proper officers must have accepted the same. In the case of Brandom v. Carter, 119 Mo. 572, the court in its opinion says, page 582, that the acceptance of a trust is necessary to the vesting of the title in the trustee; and in the case of Rogers v. Carey, 47 Mo. 232, the court held that there could be no delivery of the deed to the grantees without their express or presumed consent. In the case at bar there was no delivery of the deed from Kerfoot to the bank unless R. M. Cook, as its cashier, was authorized to receive said deed and accept the trust created by the deed and the letter accompanying the same, for the testimony of the cashier, in this case, clearly shows that none of the officers of the bank knew anything about the matter, save himself and his father, the vice-president. Mr. Cook, in his testimony, says that Dr. Kerfoot did not want the directors of the bank to know anything about it, and Dr. Kerfoot in his letter instructs the cashier to secure a notary whom he could trust to keep the matter confidential. And from the letter read in evidence and the testimony of the cashier, it is clearly apparent that the officers and directors of the bank not only did not know of the transaction, but that it was intended that they should not know of it. Now the question is, had Mr. Cook,
83 the cashier, authority to receive this deed, accept the same and the title of the property for the bank, and accept the agency and trust, which the deed and the letter accompanying, it, were designed to create in the defendant bank? The case of U. S. v. City Bank of Columbus, 21 How. 356, fully defines the powers and

duties of the cashier of a bank. In that case justice Wayne, who delivered the opinion, says, "The court defines the cashier of a bank to an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank, where they have been deposited, and as the executive officer of the bank transacts most of its business.

"The term 'ordinary business' with direct reference to the duties of cashiers of banks occurs frequently in English cases and the reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary ways. Nor has it ever been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he has not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary. Hoyt v. Thompson, 5 N. Y. 320; Thompson on Corporations, Vol. 4, Sections 4754 and 4761; The bank of the United States v. Dunn, 6 Pet. 51; Morse v. Mass. National Bank, 1 Holmes, (U. S. Cir. Ct. Rep.) 209; Morse on Banks and Banking 152. See also
84 Winsor v. Lafayette County Bank, 18 Mo. App. 665, in which case Judge Ellison, who delivered the opinion, page 671, says, "A banking corporation acts through its official agents and is held strictly to the contracts made in the name of, and on behalf of, the corporation. But the acts of the officers must be such as is in the line of their duty or agency. It is not among the ordinary duties of the cashier to bargain and sell real estate, nor to contract with brokers for that purpose. Such is not the understanding of the duties or powers of a cashier."

The case of the Western National Bank of New York v. David Armstrong, Receiver of the First National Bank, 152 U. S. Supreme Court, 346, was a case where E. L. Harper, Vice-President and General Manager of the Fidelity National Bank had borrowed of the Western National Bank the sum of $200,000 in the name of the Fidelity National Bank. The court in the opinion, by Justice Shiras, page 351, in discussing the powers of banking institutions, says: "The powers expressly granted are stated in the Eighth Section of the National Banking Act, (Rev. Stat. Sec. 5136 P. 7.) A national bank can 'exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence- of debt; by receiving deposits; by buying and selling ex-

change, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes.'

"The power to borrow money is not expressly given by the act. The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court, in the case of First National Bank of Charlotte v. National Exch. Bank of Baltimore, 92 U. S. 127, 'Authority is given in the act to transact such a banking business as it specified and all incidental powers necessary to carry*ing* it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the scope of its charter, safely
85 and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business as well as to become the creditor of others.'

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money.

"Even therefore if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the Vice-President, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bankers are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had the power to do the act in the first place. That is, in the present case, the board of directors; and that it must be made with knowledge of the material facts." See also Matthew v. Skinker, et al., 62 Mo. 329.

The power of the First National Bank, defendant, is defined by sections 5136 and 5137, U. S. Statutes, as contained in the National Banking Act. Paragraph 7 of section 5136 declares that such a bank shall have power to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of
86 exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining and issuing circulating notes, according to the provisions of this statute. Section 5137 is as follows: "A national banking association may purchase, hold, and convey real estate for the following purposes and for no other: First, Such as shall be necessary for its immediate accommodation in the transaction of its business. Second, Such as shall be

mortgaged to it in good faith by way of security for debts previously contracted. Third, Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, Such as it shall purchase at sales under judgment, decrees, or mortgages held by the association, or shall purchase to secure debts due to it." See also Blair v. Perpetual Insurance Co., 10 Mo. 560; Leggett et al. v. N. J. Manufacturing and Banking Co., et al., 23 Amer. Dec. 228, and note. We see from these authorities that it was no part of the duty of R. M. Cook, cashier, to accept the deed from Dr. Kerfoot, for the proper officers of the bank had no knowledge of the transaction and gave him no authority, as such cashier, to accept the deed or the trust, or agency, it was intended to create, and under the laws, under which said bank was chartered, the bank itself had no right to receive the title to said property, even though all the legal formalities and orders by its board of directors had been properly made. Hence: the First National Bank, defendant, never acquired any title to the property in controversy, by said deed. And if the bank did not acquire the title to this property by this deed, Dr. Kerfoot owned and was seized and possessed of the same at the time of his death, and at his death it passed to his legal heirs.

Appellants further contend that if it should be held that the deed from Dr. Kerfoot conveyed the legal title of this property to the defendant bank, then the title still remains in the bank in trust for the legal heirs of Dr. Kerfoot, for the reason that the quit claim deed signed by C. H. Cook, as vice-president, for the
87 defendant First National Bank, to Hervey, Alwilda and Lester R. Kerfoot, defendants, was and is absolutely void, for the reasons first, because the execution of the same was unauthorized by the board of directors of the bank, who alone had the power to authorize the execution and delivery of the same. As before stated, the only evidence in the case on this proposition is the testimony of the cashier, R. M. Cook, who testified that its execution was not only unauthorized by, but was unknown to, its board of directors. In the case of McKeag v. Collins, 87 Mo. 164, it was held by this court that a deed made by the president of the bank, conveying the lands of the bank, was void because the conveyance had not been authorized by the board of directors of the bank. In the case of the First National Bank of Central City v. Lucas, 31 N. W. Rep. 805, it was held that the president of a bank had no authority to sell the property of the corporation of which he was the president, and before he could make a sale he must have authority by the charter, board of directors or other proper officers. The court in the opinion, page 807, says: "The sale of the $6,000 note was without authority, at least none is shown. No rules or regulations had ever been made by the exchange committee, which would authorize it and it was not authorized by the board of directors. There is nothing in the act authorizing the organization of national banks which would authorize it, and it is not shown to have been the custom of the bank to permit the president to make such sales to be subsequently ratified. Ordinarily the authority of the president of a bank as such is very much limited. He may bring an action

at law and employ counsel for the purpose of protecting the property of the bank but he is not the executive officer nor has he charge of its monied operations. He has no more power of management or disposal of the property of the corporation than any other member of the board of directors. Morse on Banks, 146 et seq. It is true that extensive powers may be and are quite often given
88 to presidents of banking organizations by the charter of the bank, or by the action of the managing board, and, when so conferred the right to proceed thereunder will exist; but there is no proof in this case shown by the abstract of any such power." See also Fleckner vs. President, etc., 8 Wheat. 338; Bank v. Dandridge, 12 Wheat. 64, Luse v. Isthmus Transit Ry. Co. 25 Am. Rep. 506; Thompson on Corporations, Vol. 4 Sec. 4761; 4 Amer. and Eng. Ency. of Law, 1st Ed., 238; Devlin on Deeds, 1st Ed. 335, 338, 340; Leggett et al. v. N. J. Mfg. and Banking Co. and note, supra. In this last case it is expressly held that a bank cashier and president have no power to convey the real estate of the bank without express authority from the board of directors. The second reason for the invalidity of said deed is that as this property is situated in Missouri, it must be conveyed in accordance with the laws of this state. Section 2399 Revised Statutes of Missouri is as follows: "A private corporation authorized to hold estate may convey the same by deed, sealed with the common seal of such corporation and signed by the president or presiding member of trustee thereof." The testimony in this case shows that C. H. Cook, who attempted to execute this deed, was not the president or presiding member or trustee thereof. Mr. Cook, the cashier, testified that C. H. Cullers was the president of the bank and was at his home in this county where he resided at the time he was elected president and continued to reside all the time he had held the office, and he was therefore the only proper officer authorized by law to execute the deed, and was not absent in legal sense, which would authorize the vice-president to act. Besides, Mr. Cook, the cashier, testified that the by-laws of the bank authorized the vice-president to act only in the absence of the president, and then only when ordered by the board of directors. This quit claim deed is invalid for the further reason that it was not acknowledged as required by section 2408, Revised Statutes of Missouri, 1889. See the case of Eppright v. Nickerson, 78 Mo. 482, as to the sufficiency of the certificate of acknowledgement.

89 Appellants contend that this quit claim deed executed by C. H. Cook, as vice-president, to the three defendants therein named is void for the further reason that there was no legal delivery of the same. It is true that it was held by this court in the case of Sneathen v. Sneathen, 104 Mo. 201, that the delivery of a deed is an essential element of the transfer of the title of real estate, and that it must take place during the life of the grantor and cannot be made to perform the functions of a will, but that the delivery need not be made to the grantee in person; that a deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery, for the delivery takes effect by relation as of the date when first

made to the third person. It was also held in the cases of Standiford v. Standiford, 97 Mo. 231, and Tobin v. Bass, 85 Mo. 654, that "when a deed to a minor is absolute in form and beneficial in effect and the father, the *grantor* (italics ours), voluntarily causes the same to be recorded, acceptance by the grantee will be presumed and such facts constitute *prima facie* a delivery and afford reasonable presumption that the grantor intended to part with the title, and clear proof should be made that a person, who under such circumstances has executed acknowledged and caused a deed to be recorded, did not intend to part with his title." But it is also held in the case of Sneathen v. Sneathen, supra, and Standiford v. Standiford, supra, that in order that a deed should be effectual in passing the title the grantor must part with all dominion over it, with intent that it shall take effect and pass title as a present transfer.

Appellants contend that the facts in this case do not bring it within the rule laid down by these authorities, and respondents cannot claim that we have been unfair in the statement of this rule or that we have not conceded to them all that they are entitled to under the same. The facts in this case do not constitute a legal delivery under the rule.

90 The testimony clearly shows that this was not the intention of Dr. Kerfoot. His intention can only be gathered from his acts and declarations. Mr. Cook, the cashier, testified that in the conversation had with him prior to the making of the deed and the bank making the deed back, Kerfoot assigned as a reason for making the conveyance that Cook could handle the property better and the assessments would be lower. In the letter of October 9th, 1893, Kerfoot says that the quit claim deed could be held without recording and that in the event of the sale of the property by him the quit claim deed was to be surrendered and the bank was to make a deed to the purchaser. And in the letter of October 26, 1893, which accompanied these deeds and formed a part of the transaction, he wrote to Cook to have the quit claim deed acknowledged and sent to him by mail, that he would not have the quit claim deed recorded and in case he should wish to convey the property at any time, he would surrender the quit claim deed and have the bank make a new one to whom he might direct. Appellants contend that all the previous conversation and correspondence merged in these deeds, and letter of October 26; that they must all be taken together as a part of the same transaction and the warranty deed and the letter must be taken together as different parts of the same instrument according to all rules of legal construction. Lakeman, Exr. v. Hannibal & St. F. Ry. Co. 36 Mo. App. 363, 371; Givin v. Waggoner, 98 Mo. 315; 324; MacDonald v. Wolff, 40 Mo. App. 302, 309.

Then according to this letter and the arrangement made with the bank, if there was any arrangement, it was never intended by the parties that this quit claim deed should be delivered, but on the contrary thereof Dr. Kerfoot in this letter expressly says, "In case I should wish to convey this property at any time, I would surrender the quit claim deed and have the bank make a new one to whom I might direct. Please allow the impression to go forth that the bank

is the owner. When you record deed call on G. L. Winters
91 and have my insurance made payable to the First National Bank". And the testimony of Winters shows that the insurance was made payable to the First National Bank as directed. Now the delivery of this quit claim deed to defendant Beall, with instructions from Kerfoot to have it sent for record, could not constitute a delivery because it was in direct conflict with the agreement he had made with the bank and according to this letter the bank had not parted with full control over the property and the conveyance was only a conditional one. And in the event that Dr. Kerfoot should thereafter decide to convey the property this quit claim deed was to be surrendered to the bank and the bank make a new deed. This condition and this arrangement, not having been complied with there was no delivery of the deed. The bank was the grantor and never consented that it should be delivered to these three defendants and it was never intended that it should be delivered to them.

As we have before stated, the quit claim deed from C. H. Cook was unauthorized by the bank and its board of directors, and if C. H. Cook, as vice-president, had no authority to make the deed, then how could it be possible to make a valid delivery on it? Appellants therefore contend that for the foregoing reasons the warranty deed from James H. Kerfoot to the defendant bank, and the quit claim deed from C. H. Cook, as vice-president of the bank, to the defendants Hervey, Alwilda, and Lester R. Kerfoot, are nullities.

The testimony of Cook, the cashier, and the letter from Kerfoot, clearly show that he was acting as the agent and representative of Kerfoot and not the agent of the bank or of its board of directors in the transaction, and Cook testified he was Kerfoot's agent in the management of the property.

As we stated before, there is not a particle of evidence that the board of directors of the bank ever knew anything of the matter at the time or afterwards. And so far as shown by the evidence,
R. M. Cook, the cashier, had no more authority to accept the
92 deed from Kerfoot to the bank, or to make the bank Kerfoot's agent to transfer the property than he had to accept it for a member of this court, or to make this court, Kerfoot's agent to transfer the property and C. H. Cook had no more right or authority to execute or deliver the deed from the bank to these minor defendants than he had to make or deliver a deed to them for the property of a member of this court.

There is no evidence that the bank by its board of directors ever in any manner directly or indirectly ratified the acts of R. M. Cook, the cashier, or C. H. Cook, its vice-president, in receiving, or making or delivering these deeds. On the contrary the evidence clearly shows that the directors of the bank never knew anything about the transaction, for Cook, the cashier, testified that Kerfoot wanted the matter kept secret. And that the bank continued to hold and occupy the property under the Ford lease after these deeds were made.

the same as before, and continued to pay rent to Kerfoot until the day of his death.

Besides as we have shown under the law under which the bank was incorporated, it could not acquire the real estate for the purpose for which it was intended to be conveyed, hence it could not have ratified and made legal the illegal act of its cashier in receiving the deed from Kerfoot, or the illegal act of its vice president, in making or delivering the deed to the deceased to hold for the minor defendants, even if the directors had known all about the transaction. Therefore there was not, and could not have been any legal delivery or acceptance of the deed from Dr. Kerfoot to the bank, and there was not any legal execution or delivery of the deed from C. H. Cook to the minor defendants or to any one legally authorized to receive the same for them, and both of these deeds are therefore void and passed no title.

But should the court find from the evidence that the warranty deed vested the title of the property in the bank, it was conveyed to the bank for the purpose of having it transferred to these
93 three defendants as a gift, either *inter vivos* or *causa mortis.*

There can be no question but that the quit claim deed was invalid, therefore the gift was not completely executed and the title remains in the bank. In the 8 Am. and Eng. Ency. of Law, 1313, the author says: "If anything remains to be done to complete the gift, what is undone cannot be enforced, it being without consideration. If left incomplete, there exists a *locus poenitentiae,* and what has been done may be reversed. If *not completed during the life time of the donor, his death revokes that part which has been performed*" (italics ours). See also Tomlinson v. Ellison, 104 Mo. 105; Helfenstein's Estate, 18 Am. Rep. 449; Richardson v. Hadsall, 106 Ill. 476; Appeal of Walsh, 9 Am. St. Rep. 83; Thweatt v. McCullough, 5 Am. St. Rep. 391.

If this property did not vest in these defendants, and the gift was not perfected in them, then at Dr. Kerfoot's death it descended to his legal heirs, subject to the payment of his debts. There can be no question but that appellant, Robert Earl is a legal heir of James H. Kerfoot, deceased. To constitute defendants Hervey, Alwilda and Lester R. Kerfoot legal heirs, their mother, defendant Mona Kerfoot, must have been lawfully married to their father, James H. Kerfoot. The only evidence we have of such marriage is the unsupported statement of defendant Mona, who testified that after she and James H. Kerfoot had lived together in adultery for several years, both before and after the death of Kerfoot's lawful wife, and after the birth of two of the children, and after they had left Kansas City, Kansas, where they had gone under an assumed name, they went to Los Angeles, California, secured a room at a hotel, and there alone in their room, she says, Dr. Kerfoot promised to be her husband the rest of his life, and she promised to be his wife the rest of her life; that she never told any one of this arrangement until after the death of Dr. Kerfoot, but that they went on liv-

ing together after that arrangement just the same as before.
94 Appellants contend that under no law of any civilized government, not even under the liberal laws of the state of California, could it be contended that this constituted a good common law marriage. But in contradiction of her statement we have the statement of Kerfoot himself made to Mr. Ferd. K. Rule that defendant Mona was only his house keeper whom he had brought out from Missouri with him. We have his statements that he made to Mr. W. A. Rule, of Kansas City, and to Mr. Crain, the fact that he was keeping company with Mr. Crane's aunt and passing himself in respectable society as a widower, advertising for a housekeeper, his repeated acknowledgements of deeds declaring himself to be single and unmarried, and the fact that he afterwards, in Kansas City, courted Miss Clara A. Prinz, procured a marriage license and was married to her by Rev. R. L. Jamison, the certificate of marriage placed on record, and his marriage to her publicly announced in the vicinity and within a mile or two of where he and the defendant resided, are all absolute contradictions and refutations of such pretended marriage. See Appeal of Insurance and Trust Co. 57 Am. Rep. (Penn.) 448, and note, especially page 454 and cases cited.

And in addition to all this the record shows that the defendant Beall as the attorney and legal advisor of the defendant Mona, in full possession and knowledge of all the facts, procured a deed of release from Clara A. Kerfoot, releasing all her marital rights in the estate of James H. Kerfoot, as his wife, at a consideration of $4000, in the face of defendant Mona's declaration that she was the lawful wife of Kerfoot and that Clara A. Kerfoot was not and could not be his wife. But appellants insist that the defendant Mona was an incompetent witness to testify as to said marriage agreement with James H. Kerfoot, for the reason that she is a party to the suit and her marriage to Kerfoot is a contract directly in issue and on trial in this case, said Kerfoot being dead. If the defendant Mona was the legal wife of said Kerfoot solely and only on account of said pretended agreement entered into with Dr. Kerfoot on
95 the 18th day of December, 1889, and by reason of said agreement so entered into, she became and is entitled to an interest and her dower right in the property in controversy, and is therefore disqualified as a witness to prove said marriage agreement. Section 8918, Revised Statutes 1889; O'Bryan v. Allen, 108 Mo. 227; Chapman v. Dougherty, 87 Mo. 617; Meier v. Thieman, 90 Mo. 433; Nowack v. Berger, 133 Mo. 24, 37; Leach v. McFadden, 110 Mo. 584; Lins v. Lenhardt, 127 Mo. 271, 289; Hopkins v. Bowers, 16 S. E. Rep. 1.

Appellants for the foregoing reasons contend that the court erred in admitting the testimony of the defendant Mona, as to said marriage agreement, and it is clearly apparent that in view of the acts and declarations of the said James H. Kerfoot, if he had been living, he would have contradicted and denied any such marriage agreement, and the testimony clearly shows that on all proper occasions where the marriage was called in question *the* did con-

tradict the existence of such marriage. And if married to defendant Mona, as she claims, then he was guilty of the crime of bigamy by his marriage to Clara A. Prinz. All of which is conclusive proof that Dr. Kerfoot did not enter into such a marriage agreement and did not consider himself married to defendant Mona. See Appeal of Insurance and Trust Co. and note, supra.

Appellants further contend that if the defendant Mona was married to Dr. Kerfoot then she was wholly disqualified as a witness and was not entitled to testify at all, and all of her testimony as to the declarations made to her by Dr. Kerfoot, or to others in her presence, were incompetent as were also the letter from Dr. Kerfoot to her, read in evidence. See State v. Ulrick, 110 Mo. 350; Brown v. Brown, 53 Mo. App. 453; Revised Statutes of 1889, Section 8922. It is therefore insisted that appellant Robert Earl Kerfoot is the only legal heir to the estate of James H. Kerfoot, deceased; that under the law and the facts appellants are entitled to the relief prayed for.

96 Even though the court should hold that both the conveyances from Dr. Kerfoot to the bank and from the bank to these minor defendants, were valid, yet they were a mere gift and "a court of equity will require that clear and incontrovertible evidence be brought forward to establish such gift as a matter of intention and fact, and will also require that such gift or allowance or settlement be no more than a reasonable provision. * * * 'frequently such gifts, etc., fail by reason of the mere extravagance of the gift.'"

If, as stated in Lins. v. Lenhardt, 127 Mo. 271, on page 287, "in order to determine whether such gift or provision is reasonable it is proper to consider the condition of the parties as to its reasonableness, and more especially as to whether, if the gift or settlement is to stand, there will be sufficient left for the heirs of the donor; *for the heir at law is a favorite in all courts,*" (italics ours), then surely this court will never disinherit the plaintiff Robert Earl Kerfoot, in order to bestow an unreasonable allowance on the three minor defendants, who are unquestionably the illegitimate offspring of an illicit intercourse between Dr. Kerfoot and defendant Mona.

The testimony shows that Dr. Kerfoot possessed an estate worth from $75,000 to $100,000, all of which, in various ways, has been conveyed to the three illegitimate children, and to attorneys employed to defeat his only legal heir of his just rights, unless the court holds these deeds in question illegal. And although the court holds them illegal, yet this child and the only legal heir could not get to exceed one-half as much as one of these illegitimate children.

The appellant therefore asks that the judgment and decree of the trial court be reversed, and that the cause be remanded with directions to the trial court to enter up judgment as prayed

97 for in appellant's petition.

All of which is respectfully submitted.

GEO. HALL & SON.

Attorneys for Appellants.

And afterwards to-wit, on the 20th day of April, 1898, the said appellants filed their printed "additional abstract of record in correction of abstract heretofore filed," which said additional abstract is in words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2, April Term, 1898.

No. 8191.

HOMER HALL, Admr. of Estate of J. H. Kerfoot, Deceased, and Robert Earl Kerfoot, by Next Friend, Homer Hall, Appellants,

v.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK of Trenton, Mo., Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Respondents.

Appeal from Circuit Court of Grundy County.

Hon. P. C. Stepp, Judge.

Geo. Hall & Son, and Millard Patterson, Attorneys for Appellants.
Harber & Knight and Thomas J. Beall, Attorneys for Respondents.

Appellant's Additional Abstract of Record in Correction of Abstract Heretofore Filed.

On the 16th day of November, 1894, there was filed in the office of the Clerk of the Circuit Court of Grundy County, Missouri, the following:

98 *Petition for the Appointment of Next Friend.*

To the Clerk of the Circuit Court of Grundy County, Missouri:

The petition of Alice B. Wells respectfully represents:

That she is the mother of Robert Earl Kerfoot. That Robert Earl Kerfoot is an infant under the age of fourteen years; that he desires to institute a suit in the Circuit Court of Grundy County, Missouri, against The Farmers and Merchants Bank, of Trenton, Missouri; The First National Bank of Trenton, Missouri; Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, and Lester R. Kerfoot, to recover the following described real estate in Grundy County, Missouri, to-wit: Part of Lot 6, Block 29, in the city of Trenton, commencing at the northeast corner of said lot, running thence southwest along the northwest side of Water street thirty-nine feet, thence northwest at right angles with Water street to Border street, thence east along the south line of Border street to the place of beginning; with damages for the detention thereof; that he has no legally appointed guardian in the state of Missouri, and she therefore prays that Homer Hall may be appointed as his next friend for the pur-

pose of instituting said suit, the said Homer Hall having consented to act as such next friend.

ALICE B. WELLS.

Raymond, Kansas, Oct. 25th, 1894.

Written Consent of Next Friend.

TRENTON, Mo., *Nov. 1st*, 1894.

I, Homer Hall, in the above petition named, consent and am willing to serve as next friend of the above named Robert Earl Kerfoot for the purpose of instituting suit against said The Farmers and Merchants Bank of Trenton, Missouri, The First National Bank of Trenton, Missouri, Thomas J. Beall, Mona Kerfoot, Hervey Kerfoot, Alwilda Kerfoot, and Lester R. Kerfoot, and agree to be re-
99 sponsible for the costs of said suit.

HOMER HALL.

On the same sheet of legal-cap paper, and following the above is the following:

STATE OF MISSOURI,
County of Grundy, ss:

In vacation, before me, clerk of the Circuit Court of Grundy county, appeared Homer Hall and acknowledged that he executed the above written consent to serve as the next friend of Robert Earl Kerfoot, an infant, in a suit against The Farmers and Merchants Bank of Trenton, Missouri, The First National Bank of Trenton, Missouri, Thomas J. Beall, Mona Kerfoot, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, to be instituted in the Circuit Court of Grundy County.

Attest:

POE BURKEHOLDER, *Clerk.*

Order Appointing Next Friend.

In the Circuit Court of Grundy County, Missouri. In Vacation.

In the Matter of ROBERT EARL KERFOOT
v.
FARMERS AND MERCHANTS BANK, of Trenton, Mo., et al.

The petition of Alice B. Wells for the appointment of Homer Hall as the next friend of Robert Earl Kerfoot for the purpose of instituting suit against Farmers and Merchants Bank of Trenton, Mo., et al., and the written consent of said Homer Hall to serve as such next friend being presented to and approved by me, I do hereby appoint said Homer Hall as next friend of said Robert Earl Kerfoot to institute and prosecute said suit.

Done at Trenton, Missouri, this 20th day of November, 1894.

POE BURKEHOLDER, *Clerk.*

100 On the outside fold of said sheet of legal-cap is the following:

Petition for Appointment of Next Friend.

ROBERT EARL KERFOOT et al.
v.
THE FARMERS AND MERCHANTS BANK et al.

Filed Nov. 16th, 1894.

POE BURKEHOLDER, *Clerk.*
W. C. COLLIER, *D. C.*

Afterwards, on the same day, appellants filed their petition in said cause.

During the progress of the trial plaintiffs read in evidence a certified copy of a decree of the Circuit Court of McLean County, State of Illinois, granting to Alice B. Shade, mother of Robert Earl Kerfoot, a divorce from Charles W. Shade, in the year 1881, shown on page II, appellant's abstract of record, which is as follows:

Circuit Court, April Term, 1881.

STATE OF ILLINOIS,
McLean County, ss:

No. 4311. Chy.

Decree of Divorce.

ALICE B. SHADE
v.
CHARLES W. SHADE.

This cause having come on to be heard upon the bill of complaint therein and the defendant's answer and the replication thereto, and the defendant having been duly served with process of summons in this cause more than ten days prior to the first day of the present term of this Court, and having filed his answer; and the Court having heard the testimony taken before the Master in Chancery and having heard the oral testimony of witnesses sworn and ex-
101 amined in open Court, and having heard the arguments of counsel, and being fully advised in the premises, and on consideration thereof, doth find that the defendant has committed adultery subsequent to his marriage to complainant; that he is a person wholly unfit to have the care, custody and control of children.

It is therefore ordered, adjudged and decreed by the court that the marriage between the complaint and defendant be dissolved and the same is hereby dissolved accordingly; and the parties are and each of them is freed hereby from the obligations thereof.

It is further ordered, adjudged and decreed by the Court that complainant have the care, custody and control and education of the child of the said complainant and defendant without any interference on the part of the defendant until the further orders of this Court.

Appd.

O. T. REEVES, *Judge.*

Appellant's Reply.

Appellant's, in preparing their printed abstracts of record, tried to conform to Rules 7, 8, 9 and 13 of this court, and abridged the record so far as pos-ible and yet fairly present the evidence, so far as relates to the issues that were presented to and tried by the circuit court, in order to avoid the necessity, of this court wadding through a great mass of evidence that had no bearing upon the actual issues to be determined by this court, and to save costs.

The respondents present no additional abstract of record as required by Rule 11, yet in their statement they call in question the sufficiency of appellant's abstract of record. To meet this criticism appellants herewith present an additional abstract of record.

On page 5 of their statement or argument they say our record shows that the mother of appellant, Robert Earl Kerfoot, was married to Robert H. Kerfoot, son of Dr. James H. Kerfoot, on the 27th day of November, 1885, and prior thereto she was married to Charles Shade, and that at the time of her marriage to said Robert
102 H. in 1885, she was not divorced from Shade. That she was not divorced from Shade until 1891.

It is true Appellant Robert Earl Kerfoot's mother was married to Robert H. Kerfoot in Nov. 1885, and it is true that in our printed abstract of record, page 11, we say she was divorced from Shade in 1891, but this date was a mistake in the printer and was overlooked by us. It was well known by respondent's counsel to be a mistake, for they had, and examined the copy of the decree of divorce granted by the Circuit Court of McLean County, Illinois, showing that she was divorced from Shade in 1881 instead of in 1891.

We do not see how this statement of Respondent counsel could have been an oversight, for page 10 of appellant's abstract of record contains the testimony of Mrs. Claudy, the mother of Mrs. Shade, now Mrs. Wells, in which she testifies: "My daughter had been married once prior to November, 1885, to Charles Shade, in Bloomington, Illinois. She had been divorced from Shade about four years before her marriage to Robert H. Kerfoot." Respondent's counsel had certainly read this testimony. It was unquestioned, uncontradicted (except by the mistake of the printer) and as shown by the record, drawn out on cross-examination by defendant's own counsel without objection.

We cannot see why the counsel should make such a statement unless they desired to mislead the court by taking advantage of what they knew to be a mistake.

On page 6 of respondent's statement the counsel says, Mrs. Wells,

nee Mrs. Shade, was married to Robert H. Kerfoot on Nov. 27, 1885. Robert Earl was born May 6th, 1886, five months and ten days after the marriage of the mother and Robert H. (See appellants' abstract, pp. 37 and "88.") But appellants' abstract does not contain 88 pages. We do not suppose the counsel will ask the court to reverse the judgment on account of the mistake in causing them to say page 88 instead of page 38.

103 On page 2 of appellant's abstract of record, we say, the petition was filed in the cause on the 6th of November, 1894, which was also a mistake in the printer which was overlooked by us. The petition was filed on the 16th day of November, 1894, instead of the "6th." On the same day, and after the petition for the appointment of the next friend was filed, and the appointment was made. But the order of appointment shows that it was made on the 20th of November. The counsel seems to have overlooked these clerical errors, also.

It is true Appellant Robert Earl was born in less than six months after the marriage of his parents, but that did not render him illegitimate according to either the Statutes of Missouri or Kansas, even if he had been born before the marriage. See Revised Statutes of Missouri of 1889, Sect. 4474. Revised Statutes of Kansas of 1889, Sect. 2614.

Nor would said Robert Earl have been illegitimate even if the mother had not been divorced until 1891, as claimed by respondents' counsel. See Green v. Green, 126 Mo. 17. Dyer v. Brannock, 66 Mo. 391.

Defendants' counsel contend that the pretended marriage of Dr. Kerfoot and the woman Mona legitimatized their off-spring. If that be true then certainly Robert Earl is legitimate, for the marriage of his parents was performed by a legally authorized minister of the gospel, under a license granted by a court of record, and not in a private room when no one was by, except children from three to five years old and no publicity or claim of the marriage made until after the death of Dr. Kerfoot, the only party who knew the claim of marriage to be untrue, and who had continuously and in various ways denied and contradicted the claim of marriage.

This inconsistency of the counsel is but in keeping with their mis-statements on page 5 of respondents' statement, where they say, it was proven by plaintiff that at the time Mona Kerfoot mar-

104 ried Frank Earl, in 1879, Earl had a living wife, and on page 6, where they say it was proven by plaintiff that after the death of Dr. Kerfoot's first wife he was married to Mona Kerfoot in 1889. Both of these statements are bare mis-statement. The deposition of Mona Kerfoot was taken and read by respondents, against the objections and exceptions of plaintiffs, was resisted by plaintiffs from the beginning, and is still being resisted as incompetent. And the depositions of the Rules, Crane and Collier, the various deeds, and marriage certificate to Miss Printz were all introduced in evidence by appellants for the purpose of refuting the claim of Mona Kerfoot of her marriage to Dr. Kerfoot.

On pages 5 and 10 of their statement and brief they say there was

no proof that Homer Hall was the duly appointed next friend of Robert Earl, but we have shown by our additional abstract of record, that this statement is also erroneous. This appointment was and is a part of the records of the Circuit Court in this case was before the court, and a matter the court was bound to take cognizance of, the same as any other order or proceeding.

It would have been an encumbrance of the record and a useless absurdity to attempt to prove to the court what it had done, and what its record showed, with its record before it, showing the appointment, that it was required to take, judicial notice of, and it would have been a useless expense and a waste of time to have incorporated the same in the record sent to this court.

The court will pardon us again for again calling its attention to their mis-statements, but on page 11 of their brief, and as a parting shot, they say "this case is here upon the record proper, only, the alleged bill of exceptions, is wholly insufficient to present for the consideration of this court, matters occurring at the trial or warrant the court in considering the alleged bill of exceptions."

Respondents' counsel assign no reason for the alleged in-
105 sufficiency, nor do they say wherein it is insufficient. If it is insufficient they should have informed the court wherein it was insufficient, and proceeded in the manner pointed out by the statutes, instead of leaving the court to rely upon their unsupported statement. They could with equal propriety have said there was no bill of exceptions at all, or no petition, or anything else filed in the case.

The whole statment, brief and argument shows a disposition and an effort on the part of the counsel to try to mislead and deceive the court and prevent a fair consideration of the case upon its merits, as the same is devoted to technical, hair-splitting side issues in disregard of the facts, instead of a fair discussion of the merits of the case.

If there was no appointment of a next friend, and no bill of exceptions filed in the case it seems to us that it would have been better for the counsel to have filed a complete transcript of the record, with the certificate of the clerk certifying that it was a complete record of all the proceedings in the case, than to have left this court to rely upon their unsupported statement.

The real issues in the case are.

1. Was R. M. Cook, the cashier of the First National Bank, authorized to accept the deed from Dr. Kerfoot to the bank, and was it accepted?

2. Was C. H. Cook, the vice-president of the bank, authorized to execute and deliver the deed from the bank to Hervey, Alwilda and Lester R. Kerfoot, and was it delivered?

3. The heirship of the minor defendants, and

4. The action of the trial court in admitting the deposition of Mona Kerfoot.

We have produced in our printed abstract of record all the record

bearing upon the real issues of the case, as required by the
106 rules of this court and the law as we understand it. The gentlemen seem to concede that R. M. Cook had no authority to accept the deed from the bank and that C. H. Cook had no authority to execute or deliver the deed from the bank, such being the case, they were both absolutely void, and neither Dr. Kerfoot nor his legal heirs were estopped to deny their validity. Dorthitt et al. v. Stinson, 63 Mo. 268, Opin. 279; The State ex rel. Scotland Co. v. Bacon, 107 Mo. 616, Opin. 627.

Respondents' counsel say the administrator of the estate of Dr. Kerfoot was an unnecessary party to the suit. This is true in an action of ejectment alone, but in a proceeding to set aside a conveyance as a cloud upon a title, whether the estate is indebted, as the evidence shows in this case, we think the administrator is an interested party, to the extent of providing for the payment of the debts. Whether he is or not, we cannot see how defendants can be harmed by his being joined as a plaintiff.

We therefore earnestly and respectfully entreat this court not to turn this infant plaintiff and only legal heir of Dr. Kerfoot out destitute on account of any technical omission of ours, while the illegitimate offspring are left to live in luxury upon what justly and morally belongs to him, but grant him a small pittance of his just dues.

All of which is respectfully submitted.

GEO. HALL & SON,
Attorneys for Appellants.

And afterwards, to-wit, on the 21st day of April, 1898, the following proceedings were had in said cause, viz:

HOMER HALL, Adm'r, et al., App.,
vs.
FARMERS & MER. BK. et al., Resp.

Come now the said respondents by attorneys, and after
107 argument herein, submit the cause to the Court; come also the said appellant by attorneys, and submit the cause to the court on briefs.

And afterwards to-wit, on the 14th day of June, 1898, the further following proceedings were had in said cause, viz:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased, and Robt. Earl Kerfoot, Who Sues by Homer Hall, His Next Friend, Appellants,

vs.

THE FARMERS AND MERCHANTS BANK OF TRENTON, MISSOURI; THE First National Bank of Trenton, Missouri; Thomas J. Beall, Harvey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, and Mona Kerfoot, Respondents.

Appeal from Grundy County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Grundy County Circuit Court rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, April Term, 1898.

HOMER HALL, Adm'r of Estate of J. H. Kerfoot, Deceased, and Robert Earl Kerfoot, by Next Friend, Homer Hall, Appellants,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK, of Trenton, Mo.; Thomas J. Beall, Harvey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Respondents.

108 This is an action by Homer Hall, administrator of the estate of J. H. Kerfoot deceased, and Robert Earl Kerfoot, who sues by his next friend Homer Hall, to set aside a deed made by said J. H. Kerfoot on October 28, 1891, to The First National Bank of Trenton, Missouri, and a deed from said bank to the defendants Hervey Kerfoot, Lester R. Kerfoot and Alwilda Kerfoot dated October 9, 1893, by which was conveyed to said bank, and by it to said Hervey, Lester R. and Alwilda Kerfoot part of lot six, block twenty-nine in Trenton, Grundy county, Missouri, and to recover the possession of said land. The petition is in two counts, one in equity, the other in ejectment.

Defendants recovered judgment in the court below, from which plaintiffs appealed.

James H. Kerfoot died at El Paso, Texas on February 4, 1894, where at the time of his death and for several years prior thereto he resided with the defendant, Mona Kerfoot as his wife, and their children, Hervey, Lester R. and Alwilda Kerfoot, who are defendants in this suit. He was never legally married to Mona Kerfoot, but for several years before his death he recognized her as his wife,

introduced her as such and always recognized the children as his. Their oldest child was born during the lifetime of Kerfoot's first wife who died at Trenton, Missouri, in the spring of 1886. By his first wife he had several children all of whom died before their father without issue, except his son Robert H. Kerfoot. While Robert H. Kerfoot died before his father, he left as his only heir his son Robert Earl Kerfoot, one of the plaintiffs in this suit.

On the 20th day of October 1891, James H. Kerfoot, owned and was in possession of the lot in question, and on that day under an arrangement with R. M. Cook cashier of the First National Bank of Trenton, Missouri, (a bank duly incorporated under the Act of Congress) by which the lot was to be conveyed to the bank, and the title held by it, and to be thereafter conveyed to such persons as might be requested by said Kerfoot, Kerfoot conveyed to the
109 bank by warranty deed the lot in question, for the expressed consideration of $1,400, and thereafter to-wit, on the 9th day of October 1893, said bank by C. H. Cook its Vice-President conveyed by quit claim deed the lot to the defendants Hervey, Alwilda and Lester R. Kerfoot. The other officers of the bank knew nothing about the arrangement between R. M. Cook and J. H. Kerfoot. This last named deed was delivered by J. H. Kerfoot to the defendant Beall for the grantees therein named before his death.

At the time of the commencement of this suit, The Farmers and Merchants Bank of Trenton, Missouri, was in possession of the lot in question as tenants of the grantees in the deed from the bank by Cook, of whom the defendant Patton is curator.

An administrator as such has only such powers over the real estate of his decedent, as are conferred upon him by Section 129, Art. 7, Revised Statutes 1889. Under the provisions of that section he may rent the land of the deceased, where the probate court shall so order of record, in order to the payment of debts, and also order that the administrator take possession of such land, in which event he is authorized by that section to maintain an action for the recovery of the possession of the land. But in the absence of such action by the probate court the administrator has no control whatever of the land of his intestate. Thorp v. Miller, 38 S. W. Rep. 931.

At the death of a person owning land the title descends to his heirs or devisees, and his personal representatives take no interest therein except, a naked power to sell it for the payment of his debts. The possession of the land as well as the defense of the title belong to the heirs or devisees and to no other person. The administrator has nothing whatever to do with it. Chambers' Adm'r vs. Wright's Heirs, 40 Mo. 482.

He cannot maintain ejectment for the possession of the land, nor can he maintain a suit to remove a cloud from the title thereto in the absence of an order of the probate court as before stated.
110 There was therefore, no error, in the judgment of the trial court in so far as the administrator is concerned.

But it is contended by plaintiff Robert E. Kerfoot, that the deed from James H. Kerfoot to the First National Bank, conveyed no

interest in the lot involved in this litigation, and described in said deed, for the reason that the bank had no authority to accept it. Upon the other hand it is insisted by defendants that it is well settled that national banks, have power to deal in real estate for certain purposes, and that if a bank accepts a deed to land even under circumstances such as would make the act clearly ultra vires, or in violation of its charter; and although the government could object; still the deed would be good between the parties.

By § 5137, Revised Statutes, U. S. p. 998 it is provided that "a national banking association may purchase hold and convey real estate for the following purposes, and for no other. First, such as shall be necessary for its immediate accommodation in the transaction of its business, Second: such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments decrees or mortgages held by the association, or shall purchase to secure debts due to it." National Banks have no power to acquire and hold title to real estate except for the purposes expressed in, or necessarily implied from their charters, and the power to acquire and hold title to real estate in trust, merely, is not among the expressed powers, nor is it implied from the language used. But having express power to accept title to real estate for certain purposes named in its charter, does not imply that deed to real estate for a moneyed consideration therein expressed, even though no consideration passed, is absolutely void.

"If a corporation take land by grant, which by its charter it cannot hold, its title is good against third persons and strangers;
111 the State can only interfere." 1 Perry on Trusts, § 45, (4 Ed.).

In National Bank v. Matthews, 98 U. S. 621, it is said: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." The same rule is announced in Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Goundie vs. Northampton Water Co. 7 Pa. St. 233; Runyon v. Carter, 14 Pet. 122; The Banks vs. Poitraux, 3 Rand. (Va.) 136; McIndoe v. The City of St. Louis, 10 Mo. 577; and Gold Mining Company vs. National Bank, 96 U. S. 640.

If then the deed to the bank was accepted by it, it follows that the title to the lot passed to and vested in it, and that the plaintiff Kerfoot cannot question it.

It is however said by plaintiff that the deed was never accepted by the bank, and for that reason never become operative.

Before a deed to land can be said to be executed it must be delivered to the grantee therein named, or to some person, or corporation for him. Delivery is absolutely necessary, and is one of the essentials, and conditions precedent to the execution of a valid deed.

R. M. Cook cashier of the First National Bank, was the agent of the bank in its general routine business, and accepted the deed

as and for the bank, and by the direction of the grantor had it placed upon record. The bank afterwards undertook by its vice-president to convey by deed the lot to the defendants, Hervey, Alwilda and Lester R. Kerfoot, and it is idle to say that it has not accepted the deed from J. H. Kerfoot, when the very fact of its execution of a deed to the property contradicts any such supposition.

It was not necessary in order to an acceptance of the deed that the board of directors of the bank should have been called together, and then by resolution of the board accept it. Its acceptance
112 by the cashier must be held to be the acceptance by the bank.

The next question for consideration is with respect to the validity of the quit claim deed from the First National Bank by C. H. Cook its vice-president to the defendants, Hervey, Alwilda and Lester R. Kerfoot. This depends altogether upon the power of the vice-president of the bank to execute the deed.

The powers of a corporation are such as are expressly conferred upon it by the act under which it is created, and such implied powers as may reasonably and logically flow therefrom. And having the power to acquire title to real estate by deed, it has the implied power to convey it by deed, and by its board of directors to make by-laws prescribing the mode by which it may be done, provided always, that it be in accordance with the statutes of the state. By Section 2399, Revised Statutes 1889, it is provided that "A private corporation authorized to hold real estate may convey the same by deed, sealed with the common seal of such corporation and signed by the president or presiding member or trustee thereof."

The deed in question was signed "The First National Bank of Trenton, Missouri, by C. H. Cook, Vice-President, to which the seal of the bank was affixed and acknowledged by Cook Vice-President for the bank, before a notary public.

The evidence shows that the directors of the bank had nothing in any manner to do with the making of this deed, and that they knew nothing about it; that the making of the deed to the bank, and the execution of the quit claim deed now under consideration to the grantees therein named by the bank by its vice-president was in accordance with a private arrangement made between J. H. Kerfoot, R. M. Cook and C. H. Cook. That the by-laws of the corporation provide that the vice-president of the bank may act in the absence of the president, but he can only do so by order of
113 the board of directors and that while in this case the deed was executed in the absence of the president of the bank, there was no order of the board authorizing its execution by the vice-president.

As the deed was signed by the vice-president of the bank and sealed with its corporate seal it was prima facie valid. (Liggett v. N. J. M. & B. Co. 1 Saxton Ch. 541; St. Louis Public Schools vs. Risley, 28 Mo. 415), but when it was shown that its execution was without authority from the board of directors, and not in accordance with the statute, that prima facie case was overcome, and the deed shown to be invalid and insufficient to pass title. McKeag v. Collins, 87 Mo. 164.

This deed being invalid it becomes unnecessary to pass upon its question of delivery.

The quit claim deed being invalid, and insufficient to pass title to the grantees therein named, the legal title to the lot is vested in the First National Bank, and the question is whether or not it holds the title in trust for them. The evidence is conclusive that in pursuance of an arrangement between R. M. Cook cashier of the bank and J. H. Kerfoot, the property was conveyed to the bank by Kerfoot the title to be held by it and reconveyed to him, or to such persons as he might designate; and that thereafter, at El Paso, Texas, where he then resided, on the 26th day of October 1893, he executed a warranty deed to the bank for the lot, and at the same time had prepared a quit claim deed therefor from the bank to Hervey, Alwilda and Lester R. Kerfoot, and enclosed them both in the same envelope addressed to R. M. Cook, cashier Trenton, Missouri. In the same envelope was inclosed a letter from Kerfoot to R. M. Cook which is as follows:

114

EL PASO, *Oct.* 26, 1893.

R. M. Cook, Esq.

DEAR SIR: Enclosed please find two deeds, one to the bank, the other to parties therein named. Please have the quit claim deed acknowledged by Notary Public whom you can trust to be confidential. Then return said deed to me by mail in enclosed envelope. Upon receipt of said quit claim deed I will wire you.

Have my deed to First National Bank recorded and expense on me for recording. I shall not have the quit claim deed recorded at present. In case I should wish to convey the property at any time I would surrender the quit claim deed and have bank make a new one to whom I might direct. Please allow the impression to go forth that the bank is the owner.

When you record deed call on G. L. Winters and have my insurance made payable to the First National Bank. By doing as above requested you will greatly oblige me and I can not see that it could in any way discommode the bank. If so I would not ask it.

Please have deed signed and acknowledged as soon as you get it and return at once. I believe your by-laws permit the vice-president to act in the absence of the president. And attest by yourself, as cashier with the bank seal thereon.

Yours,

J. H. KERFOOT.

The evidence also showed that R. M. Cook had the deed to the bank recorded at the expense of Kerfoot, and that it has ever since retained the same, and in compliance with Kerfoot's request contained in said letter C. H. Cook, Vice-president of the bank, executed the quit claim deed and returned it by mail to Kerfoot at El Paso, Texas. It thus seems clear that the bank holds the title to lot in trust for the persons named in the quit claim deed, and that it has by its cashier and vice-president, by accepting the warranty deed
115 and having it recorded, and by attempting to re-convey the lot by the quit claim deed to the parties therein named, recog-

nized the trust in which it holds title to the lot, which it may at any time convey to the cestui que trusts without in any way interferring with the supposed rights of any other person.

But there was no declaration or creation of trust in the deed to the bank, and it may be said that it could not be created in any other way because of the statute of Frauds. Section 5184, Revised Statutes 1889, provides that, "All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is, or shall be, by law enabled to declare such trusts, or by his last will, in writing, or else they shall be void." But this contention cannot be maintained, as it is not absolutely necessary that the deed or instrument in which the estate which is to be affected by the trust is granted should also contain the declaration of the trusts upon which the property is to be held; but the trust may be manifested by any writing signed by the party to be charged, or by the party who is entitled to declare the trust." 1 Beach on Modern Equity Jurisprudence, § 150.

Contemporaneously with, and as a part of the same transaction J. H. Kerfoot, wrote, signed, and enclosed in the same envelope with the warranty deed to the bank, a quit claim deed from the bank to the defendants, Hervey, Alwilda and Lester R. Kerfoot to the same property to be executed by the bank, the letter of October 26, 1893, addressed to R. M. Cook, cashier in which he requested that the quit claim deed be signed and acknowledged as soon as it could be done and returned to him at once, which was a clear manifestation by him of an intention that the bank should take and hold the title to the property in trust, to be deeded by it to the grantees named in the deed, and sufficient to take the transaction out of the statute quoted.

116 The conclusion reached necessarily results in an affirmance of the judgment regardless of the question as to the competency of Mona Kerfoot as a witness, therefore we do not pass upon that and other questions which could not affect the result.

The judgment is affirmed. Gantt, P. J., and Sherwood, J. concur.

G. D. BURGESS, *J.*

And afterwards to-wit, on the 22nd day of June, 1898, the further following proceedings were had in said cause, viz:

HOMER HALL, Adm'r, et al., App.,
v.
FARMERS & MER. BK. et al., Resp.

Come now the said appellants by attorneys, and file their motions for rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, Division No. 2, April Term, 1898.

HOMER HALL, Adm'r of Estate of J. H. Kerfoot, Deceased, and Robert Earl Kerfoot, by Next Friend, Homer Hall, Appellants,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK of Trenton, Mo., Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, J. H. Patton, Curator, and Mona Kerfoot, Respondents.

Motion for Rehearing.

117 Now come Appellants in the above entitled cause and move the Court to grant them a rehearing in said cause for the reasons:

1st. That one of the principal points made by Appellants in their Brief and Argument was, that R. M. Cook, as cashier of Respondent, The First National Bank of Trenton, Missouri, had no authority as such cashier to accept the deed from J. H. Kerfoot to said Respondent Bank.

2nd. That there was no evidence, whatever, tending to show that said R. M. Cook did accept said deed from said Kerfoot to said bank as the agent of said bank, but on the contrary thereof the evidence tends to show that said R. M. Cook was acting as the agent of said James H. Kerfoot in the management of said property and the making and delivery of said deed and not as cashier of the bank. Which question is decisive of the case and was duly submitted by Appellants' Counsel and has been overlooked by the Court.

GEO. HALL & SONS,
Attorneys for Appellants.

Appellants' Statement and Argument.

The Court in the opinion in this case says, "But it is contended by Robert E. Kerfoot that the deed from James H. Kerfoot to the First National Bank conveyed no interest in the lot involved in this litigation and described in said deed, for the reason that "*the bank had no authority to accept it.*" The Court in the opinion again says, "If then the deed to the bank was accepted by it, it follows that the title to the lot passed to and vested in it, and that the plaintiff Kerfoot cannot question it."

Appellants' contention is, that R. M. Cook in this transaction in no manner acted for or represented the bank. The relation of Cook to the bank and to Kerfoot must be determined by his letters, that is Kerfoot's letters, to Cook and Cook's own testimony. Cook in his testimony, page 14 Appellants' Abstract, says; "The deed was sent

to us by Dr. Kerfoot through the mail. It was accompanied
118 by a letter. I have the letter, which I now produce. The letter and deed were both enclosed in the same envelope, *directed to me personally. The correspondence was most always that way.*" On page 15 of Appellants' Abstract the witness testified, "The reason he assigned for making the deed to the bank and the bank quit claiming back was, *he just thought I could handle the property better,* or the bank could handle the property better and the assessments would be lower and such as that. * * * He seemed to be desirous that the matter be kept quiet as to making the quit claim deed and did not want any action of the board of directors of the bank in the matter and wanted to know if father and I, father as Vice-President and myself as cashier could execute the quit claim deed. * * * The board of directors of the bank did not have anything to do with the making of this deed in any manner, or give any orders or directions about it, this is the quit claim signed by my father, C. H. Cook, the Vice-President. *The matter was never brought before the board of Directors at all.* * * * The First National Bank of Trenton Missouri was occupying this property in controversy at the time of the execution of these deeds as tenant of Dr. Kerfoot and the First National Bank continued to occupy the building after the execution of the deed by my father as tenant the same as before and continued to pay the rent to Dr. Kerfoot after the execution of this quit claim deed signed by my father." On page 16, the witness testified, "After the making of the quit claim deed until the date of his death I paid the taxes on the property and charged them up to his account and the reason was, *from the fall of 1890 up until the time of his death I attended to those matters for him* usually; got his tax bills and receipt and sent them to him. He would register them there and send them back to me and have me go and pay them. That was usual. Sometimes he would send his check, sometimes I would just charge them to his account. His check on First National Bank. *I attended to*
the insurance on the property through his instructions as his
119 *agent.*

We also call the attention of the Court to the letters written by J. H. Kerfoot to R. M. Cook in regard to Kerfoot's business. Beginning on page 19 and ending on page 22 of Appellants' Abstract. Especially the letter beginning on page 21. All these letters are addressed to Cook individually and are directions to him, Cook, as to how he should manage Kerfoot's business and property. In the last letter referred to he gives him directions about paying the taxes on the Miller house repairing the barbershop floor, collecting the rents of Colliers and insuring the property, wanted Cook to allow the impression to go forth that the bank was the owner of the property, wanted him to get some one to acknowledge the deed that he could trust to be confidential. In brief the whole of the testimony conclusively shows that R. M. Cook instead of being the agent and representative of the bank in the transaction was the agent and representative of Kerfoot. In fact Cook himself testified that he was Kerfoot's agent in the transaction. Instead of the officers and di-

rectors of the bank having any knowledge of the transaction in any respect the testimony shows clearly that it was the design and purpose and request of Kerfoot that they should not know it. There is not one word of evidence in the whole record tending to show that any of the officers or directors of the bank, except the cashier and his father, ever knew that such deed was made and we submit that there is not a scintilla of evidence in the record to show that they to this day know that such a deed was ever made by Dr. Kerfoot or received by R. M. Cook. It was certainly no part of R. M. Cook's duty as cashier of the bank to look after Dr. Kerfoot's property, pay his taxes, repair the buildings and collect rents. And if Mr. R. M. Cook was the agent of Kerfoot in regard to the property as he says he was then he was not the agent of the bank. The Court in its opinion says that R. M. Cook was the agent of the defendant bank for the acceptance of the deed. If he was then he was the
120 agent of the defendant bank for the rental, management, repairing and insurance of Kerfoot's property and the bank would be liable to Kerfoot for any negligence or failure on the part of R. M. Cook in respect thereto notwithstanding the undisputed evidence clearly shows that Kerfoot all the time was telling Cook to keep the matter a secret, get somebody to aid you that you can trust to be confidential, let the impression go out that the bank is the owner of the property. Hence to say that R. M. Cook was the agent of the bank in this transaction is to say that Kerfoot was bribing him to keep concealed from the officers and directors of the bank the business transactions that his acts were making the bank liable for. In other words it is saying that Kerfoot and R. M. Cook by a secret arrangement and understanding could and did make the bank an agent to transact business and to receive and convey property when Cook, as shown by his testimony, was Kerfoot's agent in the transaction and the bank nor its officers ever knew a thing about it and does not so far as the record shows to this day know that such a deed was ever made or such an agency ever created.

If this deed was accepted by the bank as held by the court in the opinion, then any irrespo-sible outside party can make the bank an agent and cast upon it burdens and responsibilities that are entirely outside and foreign to the objects and purposes for which it was created. Such a rule as this would subject every corporation and every individual responsible for the acts and conduct of the third parties that they knew nothing of and have no control over, however foreign the act may be from their allegations or line of business.

The Court in the opinion, says, "It was not necessary in order to an acceptance of the deed tha' the board of directors of the bank should have been called together and then by resolution of the board accept it." We do not contend for any such rule, but we do contend that the board of directors should, at least, have some knowledge of the existance of the transaction. It was no more a part of the
121 business for which the bank was created to act as trustee in receiving, holding in trust or conveying the real estate for the accommodation of its customers than it was a party of the privileges and powers of the bank to buy and sell groceries and dry goods.

We contend that it is just as reasonable under the evidence in this case to say that the bank will be found for the groceries or dry goods bought by Cook for the use of his own family, as to say that the bank was liable for the acts of Cook in receiving this deed and that the acceptance of the deed by Cook must be held, to be the acceptance by the bank. Such a rule would make corporations liable for every act of every agent right or wrong, authorized or unauthorized.

It was held in the case of Logan County National Bank v. Townsend, 139 U. S. 67, Book 35, page 107 L. C. P. Co., "That the national banking act is an enabling act. And a national bank cannot rightfully exercise any power except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was created."

It certainly cannot be contended that the power to act as agent and trustee in transferring real estate from one person to another is necessary to carry on the business of banking. It is also held in the same decision that where property is transferred under a contract which is merely *malum prohibitum* the party receiving may be made to refund to the party from whom it has received the property for the unauthorized purpose the value of that which it has actually received." If the bank still holds the title to the real estate in question as held by this court and if Kerfoot, if living, could have compelled the bank to refund to him the value of the property which it had actually received then Kerfoot being dead the legal heir of Kerfoot can compel the bank to reconvey to him the property which it wrongfully received and still holds.

This Court in the case of Appleman v. Appleman, 140 Mo. 122 309, in the opinion on page 313, says: "The rule being in respect to a grantee not under disability, that when such grantee is aware of the conveyance and does not discent and the conveyance is positively beneficial to him or her acceptance will be presumed." As we said before there is no evidence whatever that the bank was aware of this conveyance and the conveyance instead of being beneficial to the bank was if anything, a burden upon it and created a liability and a duty upon the bank without any compensation whatever. Therefore no acceptance can be presumed in this case.

We again call the attention of the Court to our argument on pages 13 and 14 of Appellant's Brief and Argument in support of our argument here. And we contend that the opinion in this case is in direct conflict with the authorities of the United States Supreme Court there cited, as well as the decisions of the Kansas City Court of Appeals in the case of Winsor v. Lafayette County Bank, 18 Mo. App. 665. In the case of Jones v. Williams, 139 Mo. page 1, the Court in the opinion page 24, says, "Corporations must act through boards of directors or by their authorized officers and agents. Stock holders as such have no implied power to represent the corporation, though of course they may be appointed agents and their voluntary acts may be adopted and ratified and thereby become the acts of the corporation." There can be no pretense that there was any ratification of the acts of R. M. Cook in this matter. We do not apprehend

that it will be contended for one moment that R. M. Cook as cashier of the bank would have any authority to take the moneys of the bank and invest it in real estate, even though it was beneficial to the bank without being expressly authorized by the board of directors so to do. Then how can it be said that he had authority to bind the bank and make it an agent for the purpose of receiving and holding real estate and making it a trustee or attorney to convey the same when the bank could in no manner be benefitted thereby,
123 and when its officers and board of directors knew nothing about it.

The court in the opinion says that the bank received and still retains the deed from Kerfoot, but Cook in his testimony, as we before stated, says it was directed to him personally and in his cross-examination, page 18, says, "The warranty was made and delivered through the mail to us and was retained from that time to the present." We certainly think that this testimony cannot under any rule of construction or intendment *can* be said to establish the fact that the deed was received and held by the bank. The testimony to our mind clearly contradicts this position.

The Court will pardon our earnestness and persistancy in this matter, but we sincerely contend that the rules as declared by the Court in this case are in direct conflict with the testimony and if permitted to stand would be ruinous to the business interests of the state and is certainly a great hardship and an injustice to *the* this infant appellant as it turns him out a penniless orphan in the world and deprives him of what morally, if not legally, belongs to him.

All of which is respectfully submitted.

GEO. HALL & SONS,
Attorneys for Appellants.

Received a copy of the within and foregoing and acknowledged service of the filing of the same this 21st day of June 1898.

HARBER & KNIGHT,
Attorneys for Respondents.

Filed June 22, 1898.

JOHN R. GREEN, *Clerk.*

And afterwards to-wit, on the 6th day of July, 1898, the further following proceedings were had in said cause, viz:

HOMER HALL, Adm'r, et al., App.,
v.
FARMERS & MERCH. BK. et al., Resp.

124 Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing herein doth order that said motion be and the same is hereby denied.

And afterwards to-wit, on the 21st day of February, 1908, the further following proceedings were had in said cause, viz.:

HOMER HALL, Adm'r, et al., App's,
v.
FARMERS & MERCH. B'K et al., Resp's.

Now at this day, comes the said plaintiff in error by attorney, and files petition for a writ of error and assignment of errors to the Supreme Court of the United States, directed to Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States; a writ of error allowed by David J. Brewer, Associate Justice of the Supreme Court of the United States commanding that the record and proceedings in this cause be sent to the Supreme Court of the United States within 30 days from the 8th day of February, 1908; a copy thereof being lodged for the adverse party; and a bond in the sum of One thousand dollars; which said petition for a writ of error, said assignments of error, said writ of error, said copy of said writ and said bond are filed and made a part of the record herein.

Which said petition for a writ of error is in words and figures as follows, to-wit:

Petition for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Missouri.

125 HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased, and Robert Earl Kerfoot, a Minor, by His Next Friend, Homer Hall, Plaintiffs and Appellants,
vs.
THE FARMERS & MERCHANTS BANK; THE FIRST NATIONAL BANK of Trenton, Missouri; Thomas J. Beall; Hervey Kerfoot, Alwilda Kerfoot, and Lester Kerfoot, Minors; J. H. Patton, Curator of the Estate of said Kerfoot, Minors, and Mona Kerfoot, Defendants and Respondents.

To the Honorable David J. Brewer, Justice of the Supreme Court of the United States.

Now comes Robert Earl Kerfoot, one of the plaintiffs in the above entitled cause, and shows that he was, at the times hereinafter stated, an infant under the age of twenty-one years; that on the 16th day of November, 1894, he by his next friend, Homer Hall, who was duly appointed as such, instituted suit in the Circuit Court of Grundy County, Missouri, against the defendants, to set aside a deed that had been attempted to have been made by James H. Kerfoot, deceased, the grand father of the plaintiff, to the First National Bank of Trenton, Missouri, for the following described real estate in Grundy County, Missouri, to-wit: Part of the Lot six (6), Block twenty-nine (29) in the Town, now City of Trenton in said County, and a deed from said bank to the defendants Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot, and to recover possession of said real estate; that Homer Hall the Administrator of the estate of said James E. Kerfoot, deceased, was joined as a party plaintiff in said suit; that the defendants appeared, filed answers in said cause and a trial was had in

said Circuit Court, and finding and judgment was rendered against the plaintiffs and in favor of the defendants by said court;
126 that motions for a new trial and arrest of judgment were filed in due time, which were overruled by the court and exceptions were saved, that a bill of exceptions was in due time allowed, signed and filed in said case, and an appeal was allowed and granted to this court from said finding and judgments. That a hearing was had in said cause by the court at its April term, 1898, and on the 6th day of July, 1898, this court by its judgment and decree affirmed the judgment and decree of said Circuit Court in said case; that plaintiffs on the — day of July, 1898, and within the time given, filed their motion for a re-hearing in said case, which motion was by the court, on the — day of July, 1898, overruled, and said suit was thereby finally terminated, in the Courts of the State of Missouri. That the plaintiff, Homer Hall, as Administrator of the estate of said James H. Kerfoot, deceased, having been adjudged incapable of maintaining said suit by the Supreme Court of Missouri, and having been duly notified hereof, refuses to join in this petition, being only a nominal party without interest in the suit. That the said Supreme Court is the highest court in said State in which a decision in said suit could be maintained. That your petitioner has within one year next before filing and presenting this petition, to-wit: on the 6th day of May, 1907, arrived at his majority and now claims the right to remove said judgment or decree to the Supreme Court of the United States by Writ of Error, under Sections 709, 1003 and 1008 of the Revised Statutes of the United States, because said court committed error in this: Your petitioner was and is the only heir at law of the said James H. Kerfoot, deceased, and as such, was, and is the owner and entitled to the possession of the said real estate sued for; that the pretended deed from said James H. Kerfoot to the defendant, First National Bank of Trenton, Missouri, for said real estate was an attempted conveyance by said Kerfoot to said defendant bank in trust for the use, benefit and disposal
127 of said Kerfoot, and was held, used and occupied by said defendant bank as a tenant of and for the use and benefit of said Kerfoot.

That said defendant First National Bank was and is incapable of receiving, owning holding or disposing of said real estate under and by virtue of the provisions of its charter and under and by virtue of the provisions of Section 5137 of the Revised Statutes of the United States, and said deed was and is void; that the said pretended deed from said James H. Kerfoot to said defendant First National Bank was never delivered to or accepted by said bank and no title passed from said Kerfoot to said bank for said real estate.

That the petitioner Robert Earl Kerfoot as the grandson and only heir at law of said James H. Kerfoot, deceased, was and is lawfully entitled to the possession of said real estate and rents and profits thereof; and that the said deeds from said James H. Kerfoot, deceased to said defendant, First National Bank, and the said pretended deeds made by Charles H. Cook as the vice-president of said defendant, First National Bank on behalf of said defendant bank,

to said defendants Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, for said real estate having been filed for and placed of record in the office of the recorder of deeds of said Grundy County, creates a cloud upon the petitioner's title to said real estate.

That the said Supreme Court erred in each of the following respects:

1st. In deciding, decreeing and adjudging that the defendant, the First National Bank had the right under and by virtue of the provisions of Section 5137 of the Revised Statutes of the United States, to receive and hold the title to said real estate in trust for the purpose of transferring the same to the defendant, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and by construing said Section of said Statutes to authorize such conveyance.

128 2nd. In deciding and adjudging that R. M. Cook as cashier of the defendant, First National Bank, could by virtue of his authority as such cashier, legally accept said deed for the defendant bank and the bank could acquire title to the property without the knowledge or authority of its board of directors.

3rd. In deciding and adjudging that said R. M. Cook did accept said deed as the agent and cashier of said defendant bank, and not as the agent of said James H. Kerfoot.

4th. And that said court erred in deciding and adjudging that said defendant, First National Bank, received and holds the title to said real estate in trust for said defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, as appears of record in the proceedings in said cause which is herewith submitted, and said assignment of errors is hereto attached and made a part, hereof.

That the title of said real estate depends upon the proper legal construction of said section 5137 and the right of R. M. Cook as the cashier of the defendant First National Bank, to accept the deed or title to said real estate for said bank and the right of said bank to receive and hold said title in trust, which creates and constitutes a Federal Question that your petitioner claims the right to have reviewed by the United States Supreme Court.

Your petitioner herewith presents his bond with good and sufficient security for the prosecution of said Writ of Error to effect, and for the payment of all damages and cost if he shall fail to make good his plea.

Wherefore your petitioner prays the allowance of a Writ of Error, returnable into the Supreme Court of the United States and for citation and supersedeas; that the judgment of said State Court be reversed and for all other proper relief.

129 ROBERT EARL KERFOOT,
Petitioner.

GEORGE HALL,
HOMER HALL &
FRANK HALL,
Attorneys for Petitioner.

Let the Writ of Error issue as prayed.
Dated at Washington, D. C., this 8th day of February, 1908.
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Which said assignment of errors is in words and figures as follows, to-wit:

Assignment of Errors.

To the Supreme Court of the United States:

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased, and Robert Earl Kerfoot, a Minor, by His Next Friend, Homer Hall, Plaintiff and Appellants,

vs.

THE FARMERS & MERCHANTS BANK; THE FIRST NATIONAL BANK OF Trenton, Missouri; Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, and Lester Kerfoot, Minors; J. H. Patton, Curator of the Estate of said Kerfoot Minors, and Mona Kerfoot, Defendants and Appellants.

Now comes the plaintiff in Error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri, in the above entitled matter and cause, there is manifest Error in this, to-wit:

That the Supreme Court erred in each of the following respects:

1st. In deciding, decreeing and adjudging that the defend-
130 ant, The First National Bank, had the right, under and by virtue of the provisions of Section 5137 of the Revised Statutes of the United States, to receive and hold the title to said real estate in trust for the purpose of transferring the same to the defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and by construing said Section of said Statutes to authorize such conveyance.

2nd. In deciding and adjudging that R. M. Cook as cashier of the defendant, First National Bank, could by virtue of his authority as such cashier, legally accept said deed for the defendant bank, and the bank could acquire title to the property without the knowledge or by authority of its board of directors.

3rd. In deciding and adjudging that said R. M. Cook did accept said deeds as the agent and cashier of said defendant bank, and not as the agent of said James H. Kerfoot.

4th. And that said court erred in deciding and adjudging that said defendant, First National Bank, received and holds the title to said real estate in trust for said defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, as appears of record in the proceedings in said cause is herewith submitted, and said assignment of errors is hereto attached and made a part hereof.

Respectfully submitted,
GEO. HALL,
HOMER HALL, AND
FRANK HALL,
Attorneys for Plaintiff in Error.

Filed Feb. 21. 1908.

Which said bond is in words and figures as follows, to-wit:

131 *Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Missouri.*

HOMER HALL, Administrator of the Estate of James H. Kerfoot, Deceased, and Robert Earl Kerfoot, a Minor, by His Next Friend, Homer Hall, Plaintiffs and Appellants,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK of Trenton, Missouri, Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, and Lester Kerfoot, Minors; J. H. Patton, Curator of the Estate of said Kerfoot, Minors, and Mona Kerfoot, Defendants and Respondents.

Know all men by these presents that we, Robert Earl Kerfoot, as principal, and Geo. Hall and Homer Hall, as securities, are held and firmly bound unto the Farmers and Merchants Bank; The First National Bank of Trenton, Missouri; Thomas J. Beall; Hervey Kerfoot, Alwilda Kerfoot and Lester Kerfoot, Minors; J. H. Patton, Curator of the estate of said Kerfoot minors; and Mona Kerfoot, in the sum of one thousand dollars ($1000.00), to be paid to the said obligees, their successors, representatives, and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of December, 1907 A. D.

Whereas, the above named plaintiffs, as plaintiffs in error, have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Missouri.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

132 ROBERT EARL KERFOOT. [SEAL.]
GEO. HALL. [SEAL.]
HOMER HALL. [SEAL.]

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

STATE OF TEXAS,
County of Galveston, ss:

On this 13th day of January, A. D. 1908, before me personally appeared Robert Earl Kerfoot, to me known to be the person described in and who executed the foregoing bond, and acknowledged the same as his free act and deed.

In witness whereof, I have hereunto set my name and affixed my official seal at my office in Galveston, Texas, the day and year first above written.

My term expires June 1, 1909.

[SEAL.] JOSEPH H. WILSON,
Notary Public for Galveston County, Texas.

STATE OF MISSOURI,
County of Grundy, ss:

On this 4th day of February, 1908, before me personally appeared George Hall, to me known to be the person described in and who executed the foregoing bond, and acknowledged the same to be his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Trenton, Missouri, the day and year first above written.

My term expires January 3rd, 1910.

[SEAL.] HOMER HALL,
Notary Public for Grundy County, Mo.

133 DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before me this 8th day of February, 1908, Homer Hall, of Trenton, Grundy County, Missouri, who being first duly sworn makes oath and states that he is one of the sureties signing the within bond; that he is now worth above all debts and exemptions the sum of five thousand dollars ($5000.00); that he is personally acquainted with George Hall who also signs said bond as surety; and that said George Hall is worth the sum of twenty thousand dollars ($20,000.00) above debts and exemptions.

HOMER HALL.

Sworn to and subscribed before me this 8th day of February, A. D. 1908.

[SEAL.] JAMES D. MAHER,
Notary Public, District of Columbia.

Filed Feb. 21, 1908.
JNO. R. GREEN, *Clerk.*

134 STATE OF MISSOURI, *sct:*

I, Jno. R. Green, Clerk of the Supreme Court of the State of Missouri, hereby certify that the foregoing is a full, true and complete transcript of the record in the case of Homer Hall, Administrator of the Estate of James H. Kerfoot, deceased, and Robert Earl Kerfoot, who sues by Homer Hall, his next friend, plaintiffs, against The Farmers and Merchants Bank of Trenton, Missouri; The First National Bank of Trenton, Missouri; Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, Lester R. Kerfoot and Mona Kerfoot, defendants, as fully and completely as the same appears on file in this office.

Witness my hand and the Seal of said court. Done at the City of Jefferson, this 29th day of February, A. D. 1908.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN,
Clerk Supreme Court.

135 In the Supreme Court of the United States.

ROBERT EARL KERFOOT, Plaintiff in Error,
vs.
THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK of Trenton, Mo.; Thomas J. Beall, Hervey Kerfoot, Alwilda Kerfoot, and Lester R. Kerfoot, Minors; J. H. Pattor, Curator of said Minors, and Mona Kerfoot, Defendants in Error.

In Error to the Supreme Court of the State of Missouri.

Comes now Homer Hall and states to the court that he, as administrator of the estate of James H. Kerfoot, deceased, was one of the original parties plaintiff in the trial and hearing of said cause in the state courts of the State of Missouri; that upon the hearing and final determination of said cause on appeal in the Supreme Court of the State of Missouri, said court held and decided, in its opinion delivered and filed in said cause on the 14th day of June, A. D., 1898, and reported — the 145th Missouri Report-, page 418, that said administrator could not maintain ejectment for the possession of the land involved in said action that *that* he could not maintain a suit to remove a cloud from the title thereto, and thereby denied any right of said administrator to maintain said action or to be a party thereto and said decree of said court was separable in law and in fact as to the parties plaintiff therein, the said plaintiff in error herein and said administrator.

It is further shown and stated to the court that said administrator was under no disability that would have prevented him from prosecuting a writ of error in said cause from the Supreme Court of the United States to the Supreme Court of the State of Missouri or that would extend the statutory period in which he might sue out such writ of error; that he did not sue out such writ of error or otherwise further prosecute said action; that as such administrator he had his final settlement of said estate in the Probate Court of Grundy county,
Missouri, the court by which he was appointed, which settle-
136 ment was duly approved by said probate court and he was, on the 14th day of November, 1899, by an order of said court duly and finally discharged as such administrator, as appears by a certified copy of said order hereto attached and made a part hereof; that he has not now and since the decision of the Supreme Court of Missouri was rendered he has not had any right, claim or interest in or to said action or the property therein involved.

It is further stated and shown to the court that the plaintiff in error Robert Earl Kerfoot gave the undersigned due notice to appear

and of his purpose to sue out the writ of error herein and duly requested him to join in said writ of error, but the undersigned Homer Hall, by reason of the premises aforesaid, refused and still refuses to join in such writ of error as such administrator and hereby expressly disclaims and renounces any and all right, claim or interest in said action and the property and rights involved therein, and hereby consents and agrees that said plaintiff in error, Robert Earl Kerfoot, is the sole owner of and entitled to all the rights and property sued for and involved in said action and that he may sue for, have and recover all of such rights and property freed from any and all claim, right or interest of said Homer Hall, as such administrator or otherwise.

HOMER HALL.

137 STATE OF MISSOURI,
County of Grundy, ss:

On this 3rd day of March, 1908, before me personally appeared Homer Hall, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Trenton, Missouri, the day and year first above written.

My term expires May 11th, 1909.

[Seal Lesley P. Robinson, Notary Public, Grundy County, Mo.]

LESLEY P. ROBINSON,
Notary Public within and for
Grundy County, Missouri.

138 STATE OF MISSOURI,
County of Grundy, ss:

November Term, 1899.

In the Probate Court of said County, on the fourteenth day of November, 1899, the following, among other proceedings, were had viz:

In the Matter of the Estate of J. H. KERFOOT, Deceased.

Comes now Homer Hall, administrator of the estate of J. H. Kerfoot deceased, and files a final settlement as such administrator, which is examined and approved, and it is further ordered that he be discharged.

139 [Endorsed:] No. —. Certified Copy of Order of Probate Court, made at November Term, 1899, in the matter of the Estate of James H. Kerfoot, Deceased.

STATE OF MISSOURI,
County of Grundy, ss:

I, A. B. Crooks, Judge and ex officio Clerk of the Probate Court, in and for said County, hereby certify the above and foregoing to be a true copy of the proceedings of our said Probate Court, on the day and year above written, as the same appears of record in my office, in Record Book 5 at page 562.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Trenton, Missouri, this the third day of March, 1908.

[Seal Probate Court, Grundy County, Missouri.]

A. B. CROOKS,
Judge and ex Officio Clerk of the Probate Court,
By —— ——, *D. C.*

STATE OF MISSOURI,
County of Grundy, ss:

I, A. B. Crooks, Judge of the Probate Court in and for said county of Grundy, hereby certify that the above named A. B. Crooks is ex officio Clerk of the said Probate Court, that the name above written is the true and correct name and signature of said A. B. Crooks as such Clerk, that the seal affixed to the attestation above is the seal of said Probate Court, and that the above attestation is in due form.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in Trenton, Missouri, this the 4th day of March, A. D., 1908.

[Seal Probate Court, Grundy County, Missouri.]

A. B. CROOKS,
Judge of the Probate Court of
Grundy County, Missouri.

140 [Endorsed:] No. —. Robert Earl Kerfoot, Plaintiff in Error, vs. The Farmers and Merchants Bank, et al., Defendants in Error. Refusal of Homer Hall, as Administrator of the Estate of J. H. Kerfoot, to Join in Writ of Error.

Endorsed on cover: File No. 21,057. Missouri Supreme Court. Term No. 95. Robert Earl Kerfoot, plaintiff in error, vs. The Farmers & Merchants Bank, The First National Bank of Trenton, Missouri, et al. Filed March 7th, 1908. File No. 21,057.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted] 6

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' AND MERCHANTS' BANK ET AL.

SUGGESTION OF DEATH OF J. A. PATTON, CURATOR OF LESTER R. KERFOOT, AND MOTION FOR APPOINTMENT OF A GUARDIAN AD LITEM.

HOMER HALL,
Attorney for Plaintiff in Error.

(21,057)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 95.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' AND MERCHANTS' BANK, THE FIRST NATIONAL BANK OF TRENTON, MO., THOMAS J. BEALL, HERVEY KERFOOT, ALWILDA KERFOOT, LESTER R. KERFOOT, J. A. PATTON, CURATOR, AND MONA KERFOOT, DEFENDANTS IN ERROR.

Suggestion of Death of J. A. Patton, Curator of Lester R. Kerfoot, and Motion for Appointment of a Guardian ad Litem.

Comes now Robert Earl Kerfoot, plaintiff in error, and states to the court that said J. A. Patton appeared and defended in the State courts of the State of Missouri as curator for said Lester R. Kerfoot and other defendants in error, who were then minors; that after the final decision of this cause in the courts of the State of Missouri and before the writ of error in this cause was allowed, and in the year 1900, said J. A. Patton died.

The defendant in error, Lester R. Kerfoot, is still a minor, being now about nineteen years of age, and he and the other

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 95.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' AND MERCHANTS' BANK, THE FIRST NATIONAL BANK OF TRENTON, MO., THOMAS J. BEALL, HERVEY KERFOOT, ALWILDA KERFOOT, LESTER R. KERFOOT, J. A. PATTON, CURATOR, AND MONA KERFOOT, DEFENDANTS IN ERROR.

Suggestion of Death of J. A. Patton, Curator of Lester R. Kerfoot, and Motion for Appointment of a Guardian ad Litem.

Comes now Robert Earl Kerfoot, plaintiff in error, and states to the court that said J. A. Patton appeared and defended in the State courts of the State of Missouri as curator for said Lester R. Kerfoot and other defendants in error, who were then minors; that after the final decision of this cause in the courts of the State of Missouri and before the writ of error in this cause was allowed, and in the year 1900, said J. A. Patton died.

The defendant in error, Lester R. Kerfoot, is still a minor, being now about nineteen years of age, and he and the other

personal defendants in error, as plaintiff is informed and believes, are non-residents of the State of Missouri and said Lester R. Kerfoot has no legal guardian or curator in that State and no person has appeared in this court as his guardian and curator.

The property involved in this suit is real estate situated in Grundy County, Missouri.

Wherefore, the premises considered, plaintiff in error prays the court to make an order appointing some suitable person as guardian *ad litem* to appear for and represent the interests of said Lester R. Kerfoot in this court.

ROBERT EARL KERFOOT,
Plaintiff in Error,
By HOMER HALL, *His Attorney.*

Suggestions on Motion to Appoint Guardian ad Litem.

The motion for the appointment of a guardian *ad litem* for the minor defendant in error, Lester R. Kerfoot, is made for the purpose of having him properly represented and of having a full and final adjudication of his rights in this court.

The citation was duly served upon said defendant in error and service of the citation was also duly acknowledged by Edgar M. Harber, Esq., one of the attorneys for defendants in error (Transcript of Record, page 1, *a* and *b*). As shown by the suggestion filed by Thomas J. Beall, Esq., attorney for defendants in error, Hervey, Alwilda, and Lester R. Kerfoot, and by the separate suggestion filed by Edgar M. Harber, one of the attorneys for said defendants in error, as well as by the foregoing motion, said defendants appeared in the courts of the State of Missouri by J. A. Patton as their curator, who died in 1900, after the final decision of the case in the State courts and before the writ of error was allowed. No successor of said curator was ever

appointed and his representatives have no right or interest in the property involved in this suit, either personally or in a representative capacity, the relation of said Patton having been merely a trusteeship, which ended when he died.

The rules of this court and the statutes of the United States do not appear to provide for such a situation. Rule 15, paragraph 1, provides for the substitution of the proper *representatives in the personalty or realty of the deceased party* whenever a party shall die *pending* a writ of error in this court. But this rule is not thought to be applicable, because in this case the deceased curator has no representatives in the realty or other rights herein involved and he did not die pending the writ of error, but long prior thereto.

Paragraph 3 of rule 15 provides for the substitution of proper representatives of a deceased party in a suit in the Circuit Court of the United States. This provision does not seem to be applicable, because the affidavit of Edgar M. Harber, filed in this court, shows that the deceased curator has no proper representatives who could be substituted in this court in the trust capacity of curator of the minor defendant. Besides that the suit was not in a Circuit Court of the United States, but was in the Supreme Court of Missouri.

The purpose and scope of the rule and of the statutes seem to extend to cases in which some rights in the personalty or realty have been affected by the death of a party to the suit and have been transmitted to the representatives of such party, but they do not seem to apply in case of the death of a party to a suit who appeared only in a representative capacity and who has no representatives who now have, who have had or who can hereafter have any rights or interest in the property.

The only rule of the court which seems to cover a situation of this kind is Equity Rule 87, as follows:

> "Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for

> infants or other persons who are under guardianship, or otherwise incapable to sue for themselves."

But independent of rules or statute, this court is believed to have inherent power to appoint a guardian *ad litem* for said infant, and the indulgence of the court is craved while a few of the authorities on that point are quoted.

Kent says:

> "In addition to these general guardians, every court has the incidental power to appoint a guardian *ad litem*, and, in many cases the general guardian will not be received as of course without a special order for the purpose."
>
> 2 Kent, New Ed. by Lacy, 229.

> "The power to appoint a guardian *ad litem* to represent the interests of an infant defendant is incident to the jurisdiction of every court of justice, whether of law or of equity, and of inferior as well as superior ones."
>
> 15 Am. & Eng. Ency. Law (2 Ed.), page 6.

Woerner in his American Law of Guardianship, page 47, section 16, says:

> "The appointment of chancery guardians by the court of chancery or the court of exchequer, should not be confounded with the power to appoint guardians *ad litem*, which inheres in *every court* for the protection of the rights and interests of infants when brought under their jurisdiction, unless duly represented by a competent guardian."

On page 66, section 21, the author says:

> "and though a non-resident guardian is competent to maintain a suit in behalf of his non-resident ward, yet the appointment of a guardian *ad litem* in the *appellate court* in a case prosecuted below by such non-resident guardian, is valid."

See also—

22 Cyc., 645, 646.

In Vaile *v.* Sprague, 179 Mo., *loc. cit.*, 397, the court said:

> "The infants, being necessary parties to the proceedings, when brought in by *scire facias*, they became, as it were, the wards of the court, who is said by Mr. Story in his work on Equity, sec. 1352, to be a person who is under a guardian appointed by such court and this includes guardians *ad litem, which every court has the power to appoint* [2 Kent, 229.]"

We are next led to the consideration of what constitutes an infant a ward of chancery, in respect to whom the court interferes in a great variety of cases when it would not if the infant did not stand in that predicament in relation to the court. Properly speaking a ward in chancery is a person who is under a guardian appointed by the court of chancery. But whenever a suit is instituted in the court of chancery relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court and as being under its special cognizance and protection.

Story's Eq., 13 Ed., sec. 1352.

The power of the court of chancery to appoint a guardian and make an infant a ward of the court is not, it seems, limited to cases where the infant is domiciled in the country and actually has property there, but reaches cases where the infant is but temporarily in the country and all the property is in a foreign country. Thus an infant domiciled in Scotland and having a guardian or tutor there, and being in England solely for purposes of education, has been held liable to be made a ward in chancery upon a bill filed in England, although the whole property is in fact in Scotland and under the power of a guardian or tutor there.

Story's Equity, 13 Ed., sec. 1352*a*.

In the case of O'Hara *v.* MacConnell, 93 U. S., 150, it was held that "it was the duty of the court, where the bill on

its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *feme covert,* and that no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose," although the bill showed she had a guardian.

It thus seems clear that there is inherent power to appoint a guardian *ad litem* in this case and that the Supreme Court of Missouri in Vaile *v.* Sprague, 179 Mo., l. c., 397, has recognized and asserted the existence of such power.

A non-resident may be appointed next friend for non-resident minors, but cannot be appointed guardian or curator.

Aley *v.* Ry., 211 Mo., 460, 475.

In the case of In the Matter of Francis Schreiber, 110 U. S., 76, 80; 28 L. Ed., 65, it was held that "if the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the State may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. R. S., sec. 914." See also Y-ta-tah-wah *v.* Rebock, 105 Fed., 257; *Ex parte* Connaway, 178 U. S., 421.

The plaintiff presents this discussion and these authorities in the belief that under the state of facts existing in this case the appointment by this court of a guardian *ad litem* for said infant defendant is the proper method of procedure.

All that is desired by plaintiff is that said infant be properly represented, so that the judgment of the court may be final and binding upon all parties.

If the court should take a different view of the question, then plaintiff in error most respectfully prays the court to make such order touching the premises and securing the proper appearance of said infant as to the court may seem proper.

Respectfully submitted,

ROBERT EARL KERFOOT,
Plaintiff in Error,
By HOMER HALL, *His Attorney.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 95.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS AND MERCHANTS BANK, THE FIRST NATIONAL BANK OF TRENTON, MISSOURI, THOMAS J. BEALL, HERVEY KERFOOT, ALWILDA KERFOOT, LESTER R. KERFOOT, J. A. PATTON, Curator, and MONA KERFOOT, DEFENDANTS IN ERROR.

STATEMENT OF PLAINTIFF IN ERROR.

This is an action brought to set aside a deed from James H. Kerfoot, deceased, to the defendant, the First National Bank of Trenton, Missouri, dated October 28, 1891, and a deed from Charles H. Cook, as vice-president of said First National Bank, to defendants, Hervey, Alwilda and Lester R. Kerfoot, to a part of lot 6, block 29, in Trenton, Mo., and for the recovery of the possession of said premises.

The petition contains two counts. The first count is an action in equity to set aside deeds to the real estate, page 3 of Transcript of Record. The second count is an

action at law to recover possession of the property and damages for withholding possession of the same, page 8 of Transcript of Record.

James H. Kerfoot, who was the common source of title, was a physician and resided with his family in Trenton, Mo., and on his farm adjoining, from about the year 1868 to about the year 1891. His family consisted of himself, his wife Margaret, and his four children—Walter, Robert H., Elizabeth and Theda. Walter died about 1875, was about 14 years old when he died. Lizzie died about 1880; Theda in 1885. None of whom left any heirs. The wife and mother died in the spring of 1886, testimony of John Ryan, page 19 to 25 of Transcript of Record.

For some reason Dr. Kerfoot would not let Robert stay at home, and he left in 1883. He went to Topeka, Kansas, married Alice B. Shade, November, 1885, pages 11 and 12 of record. On May 6, 1886 plaintiff in error, Robert Earl Kerfoot was born, the issue of said marriage, pages 10 and 29 of record. There seemed to be some trouble between Robert Kerfoot and his wife, and he came back to Trenton and died, or shot himself, November 24, 1886, leaving surviving him as his only heir, the plaintiff in error, Robert Earl Kerfoot, testimony of Ryan, page 22; testimony of Mrs. Claudy, page 10, and Alice B. Wells, page 29 of record. Dr. James H. Kerfoot died at El Paso, Texas, February 4, 1894, testimony pages 30 and 41 of record.

Defendant Mona Kerfoot was married to Frank Earl, at Eagleville, Mo., October 12, 1879; lived with him until April, 1882, when he left her. She was never divorced from Earl, page 55 of record. In January, 1884, she went to Trenton and lived in the family of Dr. Kerfoot, ostensibly as a help. It soon became apparent that she and Dr. Kerfoot were criminally intimate, and Mrs. Kerfoot made her leave. After leaving she went to Rosedale, Kansas, in 1885, where she and

Dr. Kerfoot lived together for four or five months, and then moved to 4th and Jersey street, Kansas City, Kansas, where they lived together and went by the name of Dr. and Mrs. Harvey. The doctor spent a part of his time there with her, and a part of the time with his family in Trenton, playing the role of Dr. Jekyll and Mr. Hyde, until the fall of 1888, when he took up his permanent abode with her at Kansas City, Kansas. He continued to live with her until his death, going from place to place, part of the time at Hot Springs, Ark., part of the time at Los Angeles, and other places in California, and a part of the time at El Paso, Texas, testimony of Ryan, pages 19 to 25, and Mona Kerfoot, pages 41 to 49. The defendants, Hervey, Alwilda and Lester R. Kerfoot, are the fruits and issue of this meretricious alliance. Defendant Hervey was born February 13, 1885, before the death of Dr. Kerfoot's first wife; Alwilda, January 20, 1887, and Lester R. was born September 23, 1890. Defendant Mona Kerfoot claims that she and Dr. Kerfoot were married by a secret common law marriage, at Los Angeles, California, December 18, 1889. That they went direct from Kansas City, Kansas, to Los Angeles, went to their room at the hotel and while alone in their room with the two infant children, she claimed she had a conversation with Dr. Kerfoot about their marriage. That he said, "I now agree to be your husband through the rest of my life." That was all of his language. That she said, "I now agree to be your wife through life, in the presence of our children." That was the only marriage agreement that was ever had between them. That she never told anyone of that agreement until after Dr. Kerfoot's death, then told it to Mr. Beall, her attorney. While they lived at El Paso, Texas, they went into society, were recognized, and recognized each other as husband and wife, introduced each other as husband and wife, and Dr. Kerfoot manifested affection for said defendant and her children, and

they for him. Testimony of Mona Kerfoot, pages 41 to 49.

But to others and at other places, Dr. Kerfoot claimed to be a widower. He told Mr. Ferd K. Rule, of Los Angeles, Cal., in July, 1891, that said defendant Mona was his housekeeper, whom he had brought out from Missouri with him, pages 27, 28 of record. He did his banking business at Kansas City, Mo., with the National Bank of Commerce of that city and made the bank his loafing place. He said his wife was dead and claimed to be a widower. He advertised for a housekeeper and gave Mr. W. A Rule, the cashier of the National Bank of Commerce, as a reference, pages 26 and 27 of record. Mr. Harry Crain, one of the tellers of the bank, as a notary public, took his acknowledgment to a number of deeds, in which he said he was single and unmarried. In the fall of 1890, he was keeping company with an aunt of Mr. Crain's, page 27 of record. Mr. Luther Collier, an attorney and notary public at Trenton, Mo., in taking his acknowledgment to a deed on August 12, 1890, asked him if he was single and he said he was. In a number of other deeds made by him after November 18, 1889, he always acknowledged himself to be single and unmarried, page 28 of record. He courted a Miss Clara A. Printz, of Kansas, City, Mo., procured a marriage license of the recorder of deeds of Bates county, Mo., on the 4th of October, 1891, and was publicly married to her at Kansas City, Mo., on the 26th day of October, 1891, by R. L. Jamison, a Methodist minister. His marriage to Miss Printz was generally known among his acquaintances, and the marriage certificate duly recorded, page 25 of record. John Ryan, Dr. Kerfoot's body servant, who lived with him for several years and was with him almost constantly, testified that he never knew of J. H. Kerfoot and defendant, Mona Kerfoot, or Mona Earl's marriage—never heard either of them claim to be married.

After the death of Dr. Kerfoot, and after his mar-

riage to Miss Clara A. Printz was known, and she was claiming her marital rights in his estate, the defendant Beall, by the direction and procurement of defendant Mona Kerfoot, bought the interest of Clara A. in the estate at a consideration of $4,000 and procured a deed from her, releasing all her rights in the estate of Dr. Kerfoot, as his wife, page 28 of record.

Dr. Kerfoot, with the assistance of his wife and children, while living in Trenton accumulated quite a fortune. He owned valuable real estate in Trenton, Mo., Kansas City, Kansas, Los Angeles, National City, San Diego and other places in California, and El Paso, Texas, and several thousand dollars in money, notes and other personal property. Some time before his death he attempted to transfer his property to these three minor defendants, children by the defendant Mona Kerfoot, by conveying the same to other parties, and having them convey it to said defendants, pages 30 and 31 of record. He executed a deed to the property in controversy to the defendant First National Bank, through an arrangement with its cashier, and then had its vice-president execute a quit claim deed to said defendants for the property, page 12 of record. The testimony of R. M. Cook, the cashier of the bank, and the letters of Dr. Kerfoot, are the only evidence there is as to these conveyances, aside from the deeds themselves. The deeds and letters accompanying them were directed to the witness R. M. Cook personally. There is no evidence that the other officers of the bank knew anything about the transaction. Cook, the cashier, testified, "that he had a conversation with Dr. Kerfoot in September, 1893, in which the doctor told him he wanted to deed the property in controversy to the bank; and the bank to make him a quit claim deed back, and if we had no objections, he would make the deeds and send to us. The reasons he assigned for making the deeds to the bank and the bank quit claiming back, was,

he thought I could handle the property better, or the bank could handle the property better and the assessments would be lower. He seemed to be desirious that the matter be kept quiet as to the making of the quit claim deed and did not want any action of the board of directors of the bank in the matter. The board of directors of the bank did not have anything to do with the making of this deed in any manner, or give any orders or directions about it. The matter was never brought before the board of directors at all." C. H. Cullers was the president of the bank at the time and was at his home where he lived during all the time he was president of the bank. Cook looked after the property for Dr. Kerfoot, paid his taxes, collected his rents, made repairs on his property and attended to his insurance as his agent, pages 15 and 16; Cook's evidence and Kerfoot's letters, pages 17, 18 and 19 of record.

The defendant, the First National Bank, was occupying the property at the time of the making of these deeds, as the tenant of Dr. Kerfoot, and continued to occupy it as his tenant and to pay the rents thereafter, the same as before, up to the time of his death. C. H. Cook had no authority from the board of directors to make the quit claim deed from the bank and the matter was never brought before the board at all. The by-laws of the bank provided that the vice-president might act in the absence of the president, but then, only by order of the board.

On the 9th day of October, 1893, Dr. Kerfoot wrote Mr. Cook, the cashier, saying, "with your approval I may deed your bank the building which you are in, requesting you to at once put it on record. At same time make a quit claim deed to such of my relatives as I may wish to have the property in case of my death by accident or otherwise, holding such quit claim deed without record. If I ever should sell it I could surrender such deed to the First National Bank and have them deed as

directed by me . . . . . The record would show the property belonged to your bank, which might tend to keep assessments lower. It is now very high." Page 17 of record.

October 26th, 1893, he mailed to Mr. Cook the deeds, with a letter instructing Mr. Cook to have quit claim deed acknowledged by a notary public that he could trust to be confidential, then return to him, saying, "I shall not have quit claim deed recorded at present. In case I should wish to convey the property at any time I would surrender the quit claim deed and have bank make a new one to whom I might direct. Please allow the impression to go forth that the bank is the owner." Page 18 of record. Neither the bank nor its officers got any instructions about the delivery of the quit claim deed. Nor did they give any one any instructions or authority to deliver it, so far as the evidence discloses. After the making of the quit claim deed, Mr. Cook, the cashier, sent it by mail to Dr. Kerfoot, at El Paso, Texas. A short time before Dr. Kerfoot's death the defendant Mona Kerfoot by his directions and in his presence, got these deeds in controversy, with others, and delivered them to Mr. Beall, at which time the doctor told Mr. Beall to have the deeds recorded. The deeds at the time were sealed up in envelopes, addressed to the different recorders. Mr. Beall took them out of the envelopes, and some fifteen days after Dr. Kerfoot's death, mailed them to the recorder of deeds for record. Several times after the delivering of the deeds to Mr. Beall, Dr. Kerfoot asked if they had been sent away for record and Mr. Beall told him that they had been delivered and that was sufficient, that he would keep them for the children, page 30 of record.

Defendant Mona Kerfoot testified on cross examination, that Dr. Kerfoot made the deed for the property to the bank and had the bank make the deed to the three defendants so they could have the property, and on being

asked when they were to have it, answered after his death.

The case was tried in the Circuit Court of Grundy County, Missouri, at the August term, 1895. The Court found the issues for defendant and dismissed plaintiff's petition.

After unsuccessful motions for new trial and in arrest of judgment the plaintiffs appealed to the Supreme Court of the State. A hearing of the case was had in the Supreme Court of Missouri, at the April term, 1898, thereof.

On the 14 day of June, 1898, said Supreme Court rendered its decision in said case affirming the judgment of the lower court, page 75 of record,

On the 22nd of June, 1898, plaintiff filed a motion for a rehearing, page 81 of record.

On the 6th of July, 1898, said motion for rehearing was denied, page 85 of record.

The plaintiff in error was born on the 6th day of May, 1886, page 6 of record, and prosecuted this suit in the state courts by his next friend, Homer Hall who was duly appointed and qualified as such. He arrived at his majority on the 6th day of May, 1907, and on the 8th day of February, 1908, within the time allowed by section 1008 of the U. S. Revised Statutes, Compiled Statutes of 1901, page 715 thereof, he, by his attorneys, presented his petition to the Honorable David J. Brewer, one of the Justices of this Court, for a writ of error in this said case to said Supreme Court of Missouri, page 86 of record, which writ was granted and issued as prayed, page 89 of record.

Homer Hall, administrator of the estate of James H. Kerfoot, deceased, one of the plaintiffs in said suit having been adjudged by said State Supreme Court to be an unnecessary party to said suit, declined to further prosecute the same, made final settlement as such administrator with the Probate Court

of Grundy County, Missouri, having jurisdiction of said estate, and was discharged from said trust and now refuses to join with his said co-plaintiff in said writ of error, having been duly requested so to do, page 92 of record.

Accompanying the petition for said writ of error plaintiff ~~presented~~ and now makes his assignment of errors, which, omitting caption and signature, is as follows:

ASSIGNMENT OF ERRORS.

That the Supreme Court of the State of Missouri erred in each of the following respects:

1st. In deciding, decreeing and adjudging that the defendant, the First National Bank, had the right, under and by virtue of the provisions of Section 5137 of the Revised Statutes of the United States, to receive and hold the title to said real estate in trust for the purpose of transferring the same to the defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and by construing said section of said Statutes to authorize such conveyance.

2nd. In deciding and adjudging that R. M. Cook, as cashier of the defendant, First National Bank, could by virtue of his authority as such cashier, legally accept said deed for the defendant bank, and the bank could acquire title to the property without the knowledge or by authority of its board of directors.

3rd. In deciding and adjudging that said R. M. Cook did accept said deed as the agent and cashier of said defendant bank, and not as the agent of said James H. Kerfoot.

4th. And that said court erred in deciding and adjudging that said defendant, First National Bank, received and holds the title to said real estate in trust for said defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot.

BRIEF.

I.

This court has repeatedly held that it does not sit to review the finding of facts made in the State court, but accepts the finding of the courts of the state upon matters of fact as conclusive.

Waters-Pierce Oil Company v. Texas, decided by the U. S. Supreme Court, January 19, 1909.

Quimby v. Boyd, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147;

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Downer v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452;

Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576.

According to the finding of the facts by the State Supreme Court in its opinion, page 75 of record, Plaintiff in error is the only surviving legal heir of James H. Kerfoot, deceased, and is entitled to the property in controversy, and to the relief prayed, unless the defendant First National Bank acquired the title to the property under and by the deed from J. H. Kerfoot to it, page 12 of record.

II.

Plaintiff in Error contends that the Supreme Court erred in deciding and adjudging that the defendant, First National Bank, had the right under Section 5137 of the U. S. Revised Statutes, to receive and hold the title to the real estate in question in trust for the purpose of transferring the same to the defendants, Hervey, Alwilda and Lester R. Kerfoot. Unless the defendant National Bank was authorized to receive real estate by this sec-

tion of the statutes it could not receive or hold the same, and the attempted conveyance was a nullity. This section is as follows:

"A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: First. Such as may (shall) be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate . . . . . purchased to secure any debts due to it for a longer period than five years." R. S. 999; 13 Stat. at L. 99.

The National Banking act is an enabling act, and a National Bank cannot exercise any powers except those expressly granted by that act or such incidental powers as are necessary to carry on the business of banking.

In the case of First National Bank vs. Converse, 200 U. S. 425, 50 L. Ed. 537, 542, the Court in the opinion by Mr. Justice White says:

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. Logan County Nat. Bank v. Townsend, 139 U. S. 67, 73, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496."

Also Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 64.

California National Bank v. Kennedy, 167 U. S. 363, 42 L. ed. 198, 200.

First National Bank of Concord v. Hawkins, 174 U. S. 363, 43 L. ed. 1007, 1009.

In the case of the Pacific Railroad Company v. Seely, 45 Mo. 212, the Court, page 220, says:

"The next question is, whether it was competent for the railroad company to hold these lots under its charter. 'A corporation,' says Chief Justice Marshall, 'being the mere creature of law, possesses only those properties which the charter of its corporation confers upon it, either expressly or as incidental to its very existence.' (Dartmouth College v. Woodward, 4 Wheat. 518.)

"The same doctrine is reiterated by McLean, J., in Beaty v. Knowler, 4 Pet. 152, and is, in effect, laid down by all the elementary writers and contained in all the American cases upon the subject. (Blair v. Perpetual Ins. Co., 10 Mo. 559; Merchants' Bank v. Harrison, 39 Mo. 433; Hoagland v. Hann. & St. Jo. R. R. Co., 39 Mo. 451; City of St. Joseph v. Saville, id. 460; Chautauque Co. Bank v. Risley, 4 Den. 485; State v. Mansfield, 3 Zabr. 510; State v. Newark, 1 Dutch. 315). The corporation, then, can purchase and hold land only for such purposes as are authorized by its charter."

And defendant, First National Bank, could not accept the deed or title to the land in controversy because it is and was expressly prohibited by its charter from so doing.

III.

The only power or authority of the defendant, First National Bank to require or hold real estate is given to it by this section 5137 of the statutes, and under this statute, it had no power or authority to accept or hold the real estate for the purpose for which it was attempted to be conveyed. The effort to convey the real estate in question being beyond the powers given to the bank to accept and hold the same, the proceedings, therefore, were an absolute nullity, there was no acceptance of the deed by it, and no title vested in it.

In the case of the Pittsburg, Cincinnati and St. Louis Ry. Co. v. The Keokuk and Hamilton Bridge Co., 131 U. S. 371, 33 L. Ed. 157, 161, the Court in

discussing the powers of corporations, in the opinion by Mr. Justice Gray says:

"The outlines of the doctrine of *ultra vires*, and the reasons on which it rests, have been clearly stated in previous judgments of this court.

"The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation as declared in the law of its organization, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2d. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3d. The obligation of every one, entering into a contract with a corporation, to take notice of the legal limits of its powers.

"These three reasons are clearly brought out in the unanimous judgment of this court, delivered by Mr. Justice Campbell, in the leading case of Pearce v. Madison & I. R. Co. 62 U. S. 21 How. 441 (16: 184), in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steamboat received and used by it and running in connection with its railroad.

"So it has been repeatedly adjudged by this court that a lease made by one railroad corporation to another, either of which is not expressly authorized by law to enter into the lease, is *ultra vires* and void. Thomas v. West Jersey R. Co. 101 U. S. 71 (25: 950); Pa. R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 630, (30: 83, 284); Oregon R. Co. v. Oregonian R. Co. 130 U. S. 1 (32: 837)."

The Court also further says:

"It is proper to add that our judgment does not rest in any degree upon the ground suggested in argument, that the bridge contract and the lease having been executed, the Pittsburgh and Pennsylvania Companies, having received the benefits of them, are estop-

ped to deny their validity; because, according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*; the value of what the defendant has actually received the benefit of. Louisiana City v. Wood, 102 U. S. 294; (26: 153); Parkersburg v. Brown, 106 U. S. 487, 503 (27: 238, 245); Chapman v. Douglas Co. 107 U. S. 348, 360 (27: 378, 383); Salt Lake City v. Hollister, 118 U. S. 256, 263 (30: 176, 178); Pa. R. Co. v. St. Louis, A. &. T. H. R. Co. 118 U. S. 290, 317, 318 (30: 83, 95)."

Central Trans. Co. v. Palace Car Co. 139 U. S. 24, 35, L. Ed. 55, 68.

California National Bank v. Kennedy, 167 U. S. 363, 42 L. Ed. 198.

In case of First National Bank of Concord v. Hawkins 174 U. S. 363, 43 L. Ed. 1007, 1010, the Court in the opinion by Mr. Justice Shiras says:

"The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

"This question has been so recently answered by decisions of this court that it will be sufficient, for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached.

"In Central Transportation Company v. Pullman's Palace Car Co. 139 U. S. 24 (35:55), after an examination of the authorities, the conclusion was thus stated by Mr. Justice Gray:

" 'It was argued on behalf of the plaintiff, that,

even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff. and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, although sustained by decisions in some of the states, finds no support in the judgment of this court . . . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

" 'A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

" 'When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.'

"The principles thus asserted were directly applied in the case of California Nat. Bank v. Kennedy, 167 U. S. 367 (42: 198), where the question and the answer were thus stated by Mr. Justice White:

" 'The transfer of the stock in question to the bank

being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute'

"'There is then quoted a passage from the decision of the court in McCormick v. Market National Bank, 165 U. S. 549 (41: 821), as follows:

"'The doctrine of *ultra vires, by which a contract* made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken, and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.'"

"The conclusion reached was thus expressed:

"'The claim that the bank, in consequence of the receipt by it of dividends on the stock of the savings bank, is estopped from questioning its ownership and subsequent liability, is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified.'"

First National Bank v. Converse, 200 U. S. 240, 50 L. Ed. 537.

Merchants' National Bank v. Wehrmann, 202 U. S. 295, 50 L. Ed. 1036;

First National Bank v. American National Bank, 173 Mo. 153, 159;

Marble Co. v. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 76;

Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160;

Ellett-Kendall Shoe Co. vs. Western Stone Co., Mo. App. 112, S. W. Rep. 4;

Anglo-American Land Mortgage & Agency Co. v. Lombard, U. S. Circuit Court of Appeals, 132 Fed. Rep. 721, 737;

Brown v. Needles' National Bank, 94 Fed. Rep. 925;

Coleman v. San Rafael Turnpike Road Co., 49 Cal. 517;

The Pacific Railroad Company v. Seely, 45 Mo. 212.

In the case of First National Bank v. American National Bank, 173 Mo. 153, the court indirectly, if not directly overruled the decision by that court in this case.

The making of the deed, and sending it to the cashier of the defendant National Bank being absolutely void, the same can be taken advantage of by any person whose interests are involved.

IV

The State Supreme Court bases its reason for sustaining the action of the trial court in dismissing the petition upon the discision of this court in the case of National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188. The Union Gold Mining Co. v. National Bank 96 U. S. 640, 24 L. Ed. 648, and other kindred cases, page 77 of record, but these cases have no application to the facts in this case. These and the cases of Nation-

al Bank of Genesee v. Whitney 103 U. S. 99; 26 L. Ed. 443, the Schuyler National Bank v. Gadsden, 191 U. S. 451, 48 L. Ed. 258, and other cases relate to the taking of real estate security for loans made by National Banks. National Banks are expressly authorized to loan money, that is the principle object and purpose of their creation, and they are expressly authorized to take personal security for such loans. Sec 5137 U. S. Revised Statues, p. 998. They are authorized to take real estate security for previous loans, to take real estate in satisfaction of previous debts, and to purchase real estate at sales made under judgments, decrees or mortgages, held by the bank or to secure debts due it. Sec. 5137 U. S. Revised Statutes, p 998.

As these banks have the power, and one of the purposes of their creation is, to loan money, the loan itself is legal and it is only the taking of real estate security at the time of making the loan that the statute prohibits. It is the security in those cases that was illegal and not the debts. And as the banks had loaned the money in good faith which they were authorized by their charters to do, the court held that the transaction was not void, but voidable, and as the debtors had received the money, they could not hold it and repudiate their obligation because they had given illegal security. The debts of themselves were just and valid, although the security was unauthorized. The officers of the banks did authorized acts in an unauthorized manner. Under the circumstances in those cases, it would have been violating the plainest principles of justice to have allowed the debtors to take advantage of the irregularity they had contributed to, and it would have been an injustice to the stockholders and creditors of the bank, who had nothing to do with the transaction. To have held otherwise, the court would have aided in

perpetrating one wrong and fraud upon innocent parties, in correcting another one.

In the case of Schuyler National Bank v. Gadesden, supra, the court in the opinion by Justice White page 261 says:—

"Now it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt co-incidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government for exceeding its powers. In Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 Sup. Ct. Rep. 496, the rule on this subject, as settled by the previous authorities, was thus stated by the court, speaking through Mr. Justice Harlan, (p. 76 L. Ed. p 111, Supt. Ct. Rep. p 499):

"In Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188, it appeared that a national bank loaned money upon the security of a note and a deed of trust of lands, both of which were assigned to it. The statute declared that a national banking association could loan money on personal property security, and could purchase, hold and convey real estate for certain named purposes, and for no others, among which was not included the securing of a present loan of money by a deed of trust or mortage on real property. The court, while assuming that the statute, by clear implications forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter by taking title to real estate for puposes unauthorized by law could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned."

The plaintiff in this case bears no such relations to

the transaction as did the defendant in the Gadsden case; here plaintiff and those under whom he claims received nothing; the bank parted with nothing. To grant the relief prayed, no injustice would be done to anybody and the plaintiff would be receiving a small part of what justly and legally belongs to him.

This is not a question as to the power of a National Bank to loan money on real estate security. This was not a conveyance to secure a loan, either present, past or future, nor was it real estate purchased under judgment or mortgage to secure a debt due the bank.

The case at bar involves an entirely different principal which is clearly distinguished in the case of the California National Bank v. Kennedy 167 U. S. 363, 45 L. Ed. 198 in which the Court in the opinion by Justice White page 201 says:

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. National Bank v. Whitney, 103 U. S. 99 (26: 443); Union Nat. Bank v. Matthews, 98 U. S. 621 (25: 188). The difference between those cases and one like this was referred to in McCormick v. Market Nat. Bank, 165 U. S. 538 (41: 817), and it is therefore unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the saving bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in

terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed as ratified."

In the case of McCormick v. Market National Bank, 165 U. S. 538, 41 L. Ed. 817, this Court in its opinion by Justice Gray page 822 says:

"The present case is not one of irregularity of organization, or of abuse of a legal power, but of an attempt to exercise a power expressly prohibited by statute.

"The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except, in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 54—61 (35: 55, 67—69); Logan County Nat. Bank v. Townsend. 139 U. S. 67 (35: 107)."

The defendant National Bank had no morepower to accept the deed and title to the property in the case at bar, than did the bank in the case of McCormick vs. Market National bank, for the law prohibiting the taking of real estate for the purposes intended in this case is just as emphatic and pre-emptory in the one as in the other, if anything it is more emphatic in the case at bar, for the reason that in the case of McCormick v. Market National Bank the owner of the property had at great expense, changed and remodeled the building in order to accommodate the bank. The bank had taken pos-

session of the property occupied and paid rent thereon for nearly three years before that controversy arose. In the case at bar there was no change in the relationship of the parties whatever. After the making of the deed, the defendant National Bank continued to occupy the property as a tenant of Dr. Kerfoot and pay rent thereon the same as before. Dr. Kerfoot by his agent, R. M. Cook, continued to collect the rents, pay the taxes and insurance on the property and make repairs thereon the same after as before. Page 15 of Record.

It is true that in the case of McCormick v. Market National Bank the bank had not fully completed its organization, but it was necessary to its very existance to have a building or place in which to transact its business. In the case at bar, the defendant National Bank had no more completed its organization for taking, holding and conveying real estate for the purpose intended than had the Market National Bank. If the Market National Bank could not accept a lease to real estate necessary for a place to transact its buisness, then the defendant National Bank in the case at bar could not accept the deed to the property in controversy for it was entirely foreign to the purpose of its creation. In the one case, the power to accept a lease depended upon the perfecting of its organization as a bank. In the case at bar, it could not, under the express provisions of the statutes, accept the deed or transfer the real estate at all for the statutes under which it was organized, expressly prohibited it from taking the property for the purpose intended.

In the opinion of the State Court by Judge Burgess on page 77 of the record, we find the following:

" 'If a corporation take land by grant, which by its charter it cannot hold, its title is good against third persons and strangers; the State can only interfere.' 1 Perry on Trusts, Sec. 45, (4 Ed.)"

Now the plaintiff in error is neither a third person in law or a stranger to the transaction, but is a privy of James H. Kerfoot both in blood and in estate.

Stacy v. Thrasher, 6 How. U. S. 44, 12 L. Ed. 337.

State ex rel. Subway Co., vs. St. Louis, 145 Mo. 551. 567.

And the transaction being *ultra vires* and void for want of authority in the defendant National Bank, and of its cashier, R. M. Cook, to accept the deed or title to the property, as shown by the various decisions of this Court, either party to the transaction can avail themselves of this want of authority on the part of the defendant National Bank.

V

Plaintiff contends that said State Court erred in deciding and holding that R. M. Cook as the cashier of the defendant First National Bank, had the authority to accept said deed from said J. H. Kerfoot.

The uncontradicted evidence is that the board of directors of the defendant First National Bank knew nothing about this matter in controversy whatever. "The matter was never brought before the board of directors to all," page 14 of record. The State Supreme Court in its opinion says: "The other officers of the bank knew nothing about the arrangement between R. M. Cook and J. H. Kerfoot," page 76 of record.

It also says: "The evidence shows that the directors of the bank had nothing in any manner to do with the making of this deed, and that they knew nothing about it; that the making of the deed to the bank, and the execution of the quit claim deed now under consideration to the grantees therein named by the bank by its Vice President was in accordance with a private ar-

rangement made between J. H. Kerfoot, R. M. Cook and C. H. Cook," page 78 of record.

The board of directors of the bank having no knowledge of the matter, the whole transaction being "in accordance with a private arrangement made between J. H. Kerfoot, R. M. Cook and C. H. Cook." If R. M. Cook had authority to accept the deed for the bank, it was by his general authority in his ordinary business as cashier, otherwise no title vested in the bank and the transaction was a nullity.

This court in the case of The United States v. The City Bank of Columbia, 21 Howard 356, 366, 16 L. Ed. 130, 133 in the opinion by Justice Wayne says:

"The term, 'ordinary business,' with direct reference to the duties of cashiers of banks occurs frequently in English cases, but in the reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary. The case of Kirk v. Bell, 71 Eng. C. L. Rep., 389 and that of Hoyt v. Thompson, 5 N. Y., 320, were very appropriately cited by the counsel of the appellee, in this connection; and we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is, to test that fact by an inquiry into the corporate ability which has been given them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them. Such was the view of this court when it decided, in the case of, The Bank of the United States v. Dunn, 6 Pet., 51 that a release given by its president

and cashier to the indorser of a promissory note of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind. The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the .president or directors of the Company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the City Bank of Columbus became a Corporation does not, in any part of it, give any power to a cashier to act independently of the directors."

Bank of United States v. Dunn, 6 Peters, 51, 8 L. Ed. 316;

Western National Bank v. Armstrong, 152 U. S. 346, 38 L. Ed. 470;

Norton v. Derby National Bank, (61 N. H. 589,) 60 Am. Rep. 579;

Bank of Commerce v. Hart, 37 Neb. 197, 40 Am. St. Rep. 479;

Bank of Healdsburg v. Bailhache, 65 Cal. 339.

In addition to the powers conferred upon National Banks by Sec. 5137 of the U. S. Revised Statutes, they have the following:

"Sec. 5136. Every national banking association is authorized "To exercise by its Board of directors or duly authorized officers or agents subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal property; and by obtaining, issuing and circulating notes according to the provisions of this title.' '

This section and section 5137 confer all the authority and the only authority of the Vice President and cashier of the defendant national bank relating to this

matter, and if these sections of the statutes can be construed to authorize and legalize the acceptance of the deed from J. H. Kerfoot by the cashier and vesting the the title to the property in the bank as held by the State Supreme Court, then the cashier and vice president can, without the knowledge of the directors and stockholders of the bank, engage the bank in any other avocation, or enterprise, however hazardous, or however foreign from the object of the creation of the corporation. There would absolutely be no limit to their powers and no protection to the Stockholders or depositors of the bank. The money they invested in bank stocks or deposited for safe keeping, could, without their knowledge or consent be used by the officers of the bank in financing, building, or operating railroads, steamships, manufactories, speculating in stocks or in any other hazardous enterprise and they would have no power to prevent it. Nobody would dare invest their money in the banking business, or deposit it in a bank. — Such a construction of these sections of the statutes, is clearly eroneous, and to hold, as did the Supreme Court of Missouri, "That the sovereign alone can object," to the unauthorized act, would render them unconstitutional and void, and deprive the citizen of the right of protection of his property.

The fact that no loss resulted from this particular transaction affords no justification or excuse for the illegal and unauthorized act. There could be no end to the loss or injury that might result from such a precedent.

The accepting of this deed was not one of the incidental powers necessary to carry on the business of banking, nor was it accepted as a security for a past indebtedness or purchased under judgment in favor of the bank. Neither was it for the purpose of owning a banking house of its own for as heretofore stated, the

bank continued to pay rent as a tenant to Dr. Kerfoot and the cashier and vice-president immediately after receiving the deed, attempted to convey the property away.

VI

There is no evidence that the defendant First National Bank, its officers, except its Vice President and cashier, or its board of directors ever knew of this attempted conveyance, much less ratified the same. There could have been no ratification of the same. The act was unauthorized and beyond its powers, illegal and void, and was incapable of ratification.

This Court in the case of Western National Bank v. Armstrong 152 U. S. 346, 38 L. Ed. 470, 473 in the opinion by Justice Shiras says:

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank,

unless ratification on the part of the bank be shown."

"It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction."

California National Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198, 200;

Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed., 55, 68;

Union Pacific Ry. Co., v. Chicago, Rock Island & Pacific Ry. Co., 163 U. S. 564, 41 L. Ed. 265.

If the defendant National Bank could not accept the deed and title in this case for want of corporate authority, then its cashier without the knowledge or consent of the board of directors certainly could not accept the same. To say that the bank could not accept the deed and title for want of corporate authority, but that it could accept the deed by the unauthorized acts of its agent would be an absolute absurdity. It could not give its cashier, Cook, authority it did not possess itself. Cook, its cashier could no more accept the deed in controversy for the bank than he could accept it for a dead person or an inanimate object, for the bank had no authority to accept it, and did not exist for that purpose, and was expressly prohibited from so doing under the very laws under which it was created.

VII

The attempted conveyance of the property by J. H. Kerfoot to the defendant National Bank and the accept-

ance of the deed by R. M. Cook the cashier of the bank being *ultra vires* no title to the property passed from Kerfoot or vested in the bank, because the bank not only did not, but could not accept the deed or the title to the property. There was neither a delivery nor an acceptance of the deed.

In the case of Hall v. Hall, 107 Mo., 101, the Court in the opinion page 107, says:

"To operate as a complete and effectual conveyance of land, a delivery of the deed, actual or constructive, by the grantor and an acceptance by the grantee, or by some one for him, are essential requisites. These are the final and crowning acts in the conveyance, without which all other formalities are ineffectual. The grantor must part with the deed and all right of dominion over it; intending that it shall operate as a conveyance, and the grantee must accept it. Standiford v. Standiford, 97 Mo. 238; Huey v. Huey, 65 Mo. 689; Taylor v. Davis, 72 Mo. 291, 2 Greenl. Ev., sec. 297; Tyler v. Hall, 106 Mo. 313."

And Miller v. McCall, 208 Mo. 562, 580.

In the case of Armstrong v. Morrill, (14 Wall.) 81 U. S., 120, 20 L. Ed. 765, 770, this Court in the opinion by Justice Clifford says:

"Authorities are hardly necessary to show that the mere making of a trust deed, like the one in question, without any acceptance, express or implied, by the trustee is not sufficient to vest in the trustee the title to the land mentioned in the deed, and that parol proof is admissible in such a case to show that the trust was never accepted."

There could have been no acceptance of the deed in this case for the board of directors, the only persons or body that was authorized to accept it for the defendant National Bank knew nothing about the transaction

whatever. The same, as stated by the State Supreme Court being "in accordance with a private arrangement made between J. H. Kerfoot, R. M. Cook, and C. H. Cook." The board of directors could not accept a deed that they knew nothing about and had never heard of or seen.

The attempted conveyance to the defendant National bank, being *ultra vires* and void, the plaintiff in error being the only legal heir of J. H. Kerfoot, deceased, is entitled to recover the property.

In case of Central Transportation Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. Ed. 55, 69, the Court in the opinion by Justice Gray, says:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently, with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

Pullman's Palace Car Co. v. Central Transportation Co. 171 U. S. 138, L. 43 Ed. 108.

VIII

In the State Supreme Court the defendants in error, in their brief and argument called in question the

legality of the appointment of the next friend of Plaintiff in error as well as other questions, which were not passed upon by that Court. But as these questions were not taken or raised by defendants either by demurrer or answer, they were deemed to have waived them. The Missouri Statutes governing these questions are as follow:

"Sec. 598. *Defendant may demur for what causes.*— The defendant may demur to a petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of action; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

"Sec. 602. *What objections deemed waived, and what not.*—When any of the matters enumerated in section 598 do not appear, upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

Revised Statues of Mo., 1899. Sects. 598, and 602.

Tayler v. Patten, 152 Mo; 434;

Calm by Next Friend, v. Metropolitan State Ry. Co. 182 Mo. 577, 580.

Baxter by Curator, v. St. Louis Transit Co. 198 Mo. 1, 14.

Gross Admr. v. Watts, 206 Mo. 373, 392.

These questions having been waived by defendants in Error, we think it unnecessary to make further mention of them.

For the foregoing reasons plaintiff in Error contends that the judgment and decree of the state courts are erroneous, and should be reversed and the cause remanded with instructions to the Circuit Court to enter a judgment and decree upon the first count of the petition in favor of plaintiff, cancelling and annulling the deeds from J. H. Kerfoot to the defendant National Bank and from the defendant National Bank to the defendants Hervey, Lester R. and Alwilda Kerfoot, and on the second count in the petition for possession of the premises sued for and rents and damages for withholding from plaintiff the possession of the same.

Respectfully Submitted,

GEO. HALL,
HOMER HALL, and
FRANK HALL,
Attorneys for Plaintiff in Error.

W.B.C.BROWN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 6.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' AND MERCHANTS' BANK ET AL.

BRIEF FOR THE DEFENDANTS IN ERROR.

T. J. BEALL,
Counsel for Defendants in Error.

(21,057.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 6.

ROBERT EARL KERFOOT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' AND MERCHANTS' BANK, THE FIRST NATIONAL BANK OF TRENTON, MISSOURI; THOMAS J. BEALL, HERVEY KERFOOT, ALWILDA KERFOOT, LESTER R. KERFOOT, J. A. PATTON, CURATOR, AND MONA KERFOOT, DEFENDANTS IN ERROR.

STATEMENT OF THE DEFENDANTS IN ERROR.

On the 28th day of October, 1891, Dr. James H. Kerfoot conveyed to The First National Bank of Trenton, Missouri, one of the respondents, by warranty deed, in due form, which deed was duly acknowledged and recorded, in Grundy County, Missouri, a part of lot six (6), in block twenty-nine (29) in the city of Trenton; there was then situated upon said property a certain two-story brick building, the first

floor of which was at the institution of this suit used as a banking room by respondents, Farmers' and Merchants' Bank. Prior to the making of this conveyance by Dr. Kerfoot to the bank, he had written Mr. R. M. Cook, cashier of said bank, in reference thereto, as follows:

"KANSAS CITY, MO., *Oct. 9th.*

"MY DEAR SIR: With your approval I may deed to the bank the building which you are in, requesting you at once to put it on record. At the same time make a quit-claim deed to such of my relatives, as I wish to have the property, in case of my death, by accident or otherwise, holding such quit-claim deed without record. If ever I should sell, I could surrender such deed to the First National Bank, and have them deed as directed by me. The deed from you to my relatives would have to be signed by yourself, as cashier, and president or vice-president. * * *

"Yours,

"J. H. KERFOOT,
"*Kansas City, Mo.*"

Mr. Cook, having expressed a willingness to serve Dr. Kerfoot as requested, the doctor thereafter wrote him, enclosing deed from himself to the bank, and quit-claim deed from bank to his children, the defendants, Hervey, Alwilda and Lester R. Kerfoot, and with said deeds enclosed the following letter:

"EL PASO, TEXAS, *Oct.* 26, 1893.

"R. M. COOK, ESQ.

"DEAR SIR: Enclosed please find two deeds, one to the bank, the other to parties therein named. Please have quit-claim deed acknowledged by notary public, whom you can trust to be confidential, then return said deed to me by mail, in enclosed envelope,

upon receipt of said quit-claim deed I will wire you. Have my deed to First National Bank recorded and expense on me for recording.

"I shall not have quit-claim deed recorded at present. In case I should wish to convey the property at any time I would surrender the quit-claim deed and have the bank make a new one to whom I might direct.

"Please allow the impression to go forth that the bank is the owner. * * * Please have deed signed and acknowledged as soon as you get it and return at once. I believe your by-laws permit the vice-president to act in the absence of the president, and attested by yourself, as cashier, with the bank seal thereon.

"Yours,

"J. H. KERFOOT."

This quit-claim deed was enclosed by Dr. Kerfoot for execution by the bank, was signed "The First National Bank of Trenton, Missouri, by C. H. Cook, vice-president; attest by R. M. Cook, cashier," and the seal of the bank thereto attached, the acknowledgment of said C. H. Cook, as vice-president, duly taken, on the 9th day of November, 1893; and by the bank, its cashier, Robert M. Cook, immediately returned to Dr. James H. Kerfoot, at El Paso, Texas. Prior to the making of this deed by Dr. Kerfoot to the bank and the deed from the bank to Hervey, Alwilda, and Lester R. Kerfoot, the first floor of the building upon the premises sued for had been leased to defendant First National Bank for a term of years, and the First National Bank had afterwards transferred such lease to defendant Farmers' and Merchants' Bank and the last-named bank was occupying the first floor of said building at the institution of this suit. Dr. Kerfoot paid the taxes and insurance upon the property and

received the rents therefrom until his death (Rec., pp. 14, 16, 17).

Dr. Kerfoot died in El Paso on the 4th day of February, 1894. About one week prior to his death he placed in the hands of Thomas J. Beall, a lawyer in said city of El Paso and a brother Knight Templar, among other deeds and papers, the deed made by the First National Bank, hereinbefore mentioned, to Hervey, Alwilda, and Lester R. Kerfoot. This deed, as well as divers other deeds and property, was delivered by Dr. Kerfoot to Mr. Beall for his children, Hervey, Alwilda, and Lester R. The deeds delivered to Mr. Beall were enclosed in separate envelopes and addressed with an indelible pencil, in the handwriting of Dr. Kerfoot, to the recording offices of the different counties and States where the same were to be recorded. Dr. Kerfoot requested Mr. Beall to send them on and have them recorded, and upon several occasions after their delivery asked Mr. Beall if he had sent the deeds on for record. Mr. Beall assured him that the delivery thereof to him was sufficient, and that he would keep them for his children, and upon being so assured Dr. Kerfoot expressed himself as satisfied, and never thereafter spoke of them.

Upon delivery of the deeds, notes, etc., to Mr. Beall, he took them to the office of Davis, Beall & Kemp, and kept them in his possession until after the death of Dr. Kerfoot, when he sent them for record, the deed from the First National Bank to Hervey, Alwilda, and Lester R. for the property in question, duly recorded in Grundy County, Missouri, on the 20th day of February, 1894. Dr. Kerfoot expressed his apprehensions to Mr. Beall that there might be some contention or litigation over his property; said that he had adopted this method of conveying the property to his children, through deed, believing it was better than by will, and asked Mr. Beall as to whether such conveyances, made in his lifetime, were not the better way to protect his children in the property. Being told by Mr. Beall that he

thought it was, the doctor said for this reason he had adopted this plan. Mr. Beall informed Dr. Kerfoot that it was necessary to deliver the deeds in his, the doctor's, limetime; Doctor Kerfoot replied that he was aware of that; and the deeds were delivered, as we have said, to Mr. Beall, and by him then taken to his office and placed in the safe of his firm and never, thereafter, were they in the possession of Dr. Kerfoot (Rec., p. 30).

As the Supreme Court of Missouri did not pass upon the legitimacy of the children of Doctor J. H. Kerfoot, who are the beneficiaries under the trust created by his deed to the bank and the deed from the bank to his children, we deem it unimportant to the determination of the issues here to refer further to the facts as they appear in the record touching this matter. (See Opinion of Supreme Court of Missouri, Rec., p. 75.)

BRIEF.

I.

The Supreme Court of the State of Missouri having held that the deed made by J. H. Kerfoot on October 28th, 1891, to the First National Bank of Trenton, Missouri, was accepted by said bank upon a full consideration of the evidence in the case, this court will not review the findings of fact made in the State court.

Waters-Pierce Oil Co. *vs.* Texas, decided by the U. S. Supreme Court, January, 1909.

Quimby *vs.* Boyd, 128 U. S., 489; 32 L. Ed., 503.

II.

Defendants in error contend that while the national-bank act is an enabling act and a national bank cannot exercise any powers except those expressly granted by that act, or

such incidental powers as may be implied, still this court has repeatedly held that if a corporation take land by grant which by its charter it cannot hold its title is good against third persons, and that the State only can interfere.

In *National Bank vs. Matthews* (98 U. S., 621), it is said:

> "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable, and the sovereign can alone object."

The same rule is announced in numerous other decisions of this court.

In *National Bank vs. Whitney* (103 U. S., 99; 26 L. Ed., 443), the court construing United States Revised Statutes, section 5137, held: That the act specifying the purpose for which a national bank might purchase, hold, and convey real estate, did not make void mortgages taken for other purposes by a banking association authorized to transact business.

And in *Jennie M. Thompson et al. vs. St. Nicholas National Bank* (146 U. S., 240; Law Ed., 36, 957), it is held: That a violation of the provision of the United States Revised Statutes, section 208, by national bank, in overcertifying checks, does not preclude the bank from enforcing its claim out of collaterals pledged to secure the obligations of the drawer of the checks; that the only penalty forbidding the certification of checks by national banks, unless one drawn on deposits, is a forfeiture of the bank's charter, and that their validity can be questioned only by the United States and not by private parties.

In *Ezra De Fritts vs. George W. Parker* (132 U. S., 282; L. Ed., 33, 317), where a deed made by Groshon to the Comstock Mining Company, whereby the grantor assumed to convey the property in dispute, was attacked on the ground that the company as a foreign corporation had not

observed the Constitution and statutory requirements which authorized such corporation to do business in the State of Colorado. It was held in the court below that plaintiff as grantee of Groshon could assert the invalidity of the conveyance to the corporation, and the deed of trust made by said corporation. The case was reversed by the Supreme Court, Mr. Justice Harlan delivering the opinion. The court say:

> "It is not for a judiciary at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting for the benefit of such parties the estate thus conveyed to the corporation and by it conveyed to others. If Groshon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded; but the present plaintiff asserting title under him cannot in law, occupy any better position than the original grantor would have done if he had himself brought this action."

And the court further refer to the case of *Union National Bank vs. Matthews* (98 U. S., 621), and say:

> "The question in this case was directly presented—whether a national bank was entitled to the benefit of a deed of trust upon real estate, which, with the note described in it was taken not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but for a loan made by the bank at the time the deed of trust was assigned to it. The Supreme Court of Missouri held: The deed of trust to be void in the hands of the bank, because its loan was made upon real estate secured in violation

of the statute; but this court, after observing that the result insisted upon did not necessarily follow, said:

"'The statute does not declare such a security void. It is silent upon the subject; if Congress so meant, it was easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision.'

"Again, 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object.'"

See also

Smith *vs.* Shelley, 79 U. S., 12 Wall., 358-361.
Myers *vs.* Croft, 80 U. S., 13 Wall., 295.
Fortier *vs.* New Orleans National Bank, 112 U. S., 439.
Reynolds *vs.* Crawfordsville Nat'l Bank, 112 U. S., 405.

In Scott *vs.* De Weese, 181 U. S., 202; 45 L. Ed., 822, it is held by this court: That the holder of certificates of stock in a national bank association cannot escape liability as a stockholder under the United States Revised Statute 51, on the ground that the shares of stock are part of an increase made, without compliance with the condition of the act of May 1, 1886, and in this case the court refer to the decision in *Union National Bank vs. Matthews,* and say: That the doctrine of the Matthews case has been often reaffirmed, citing numerous cases to that end.

The numerous cases cited by plaintiff in error in his brief it will be readily seen by this court are inapplicable to the issues involved in this case, and are clearly differentiated in principle.

III.

It is not necessary to determine whether the quit-claim deed was sufficient to pass legal title to the lot to the grantees therein named since the Supreme Court of Missouri conclusively held: That the execution of said quit-claim deed, in connection with the evidence, clearly raised a trust in favor of the grantees, and the creation of the trust was based upon the evidence and supported by the court in its opinion, by reference to State statutes and decisions and the general principles of equity jurisprudence, and the conclusion of the court thus reached in affirming the judgment we believe this Honorable Court will not undertake to review.

IV.

Dr. Kerfoot, if living, could not question the power or authority of the bank to receive the deed made by him to it, nor the authority of the bank to make the conveyance back to his children, as requested by him, and plaintiff in error stands in no more favorable position in regard to this matter than would Dr. Kerfoot, if living.

French *vs.* Spencer, 62 U. S., 97.
Broadwell *vs.* Merritt, 87 Mo., 95.
Wherry *vs.* Hale, 77 Mo., 20.
Ins. Co. *vs.* Smith, 117 Mo., 261-289.
Weiss *vs.* Heitkamp, 127 Mo., 23.
Henderson *vs.* Henderson, 13 Mo., 107.
Pruehart Wheed *vs.* Mining Co., 107 Mo., 616.
Reynolds *vs.* Bank, 112 U. S., 405.
Bank *vs.* Flathers, 45 L. A. R., 75.
Bond *vs.* Tennell Mfg. Co., 82 Tex., 310.
Herman on Estoppel, sec. 573, p. 577.
Morse on Banking, vol. 1, § 75, 3d ed.
Perry on Trusts, sec. 45, 4th ed.
Bob *vs.* Bob, 89 Mo., 411.
Amer. & Eng. Ency. of Law, vol. 7, p. 29, and cases cited.

V.

The delivery by Dr. Kerfoot to Mr. Beall of the deed made by the bank, at Dr. Kerfoot's instance and request, to his children was a good delivery thereof, and vested title to the land in controversy in said children, so that neither Dr. Kerfoot, nor any one in privity with him, in blood, law or estate, can be heard to assert the invalidity of such deed.

Jackson *vs.* Powell, 87 Ala., 685.
Carroll *vs.* Head, 17 Mo., 561.
St. Louis Public Schools *vs.* Risbey, 28 Mo., 415.
Standiford *vs.* Standiford, 97 Mo., 231.
White *vs.* Pollock, 117 Mo., 467.
Huey *vs.* Huey, 65 Mo., 698.
Deddiwillder *vs.* Smith, 40 N. E. Rep., 748.

VI.

That while it is immaterial to the real issues in this case to determine whether the children of Dr. Kerfoot and his recognized and acknowledged wife Mona were born in lawful wedlock, yet we insist that the marriage between Dr. Kerfoot and the defendant Mona in 1889 was a valid marriage and legitimatized the children, under the laws of California, Missouri and Texas, and that said children and each of them are his lawful heirs.

Blythe *vs.* Ayres, Lawyers' Reports, Anno., Book 19, p. 40.
Cargile *vs.* Wood, 63 Mo., 501.
Dyer *vs.* Brannock, 66 Mo., 391.
State *vs.* Bittick, 103 Mo., 183.
Boyer *vs.* Dively et al., 58 Mo., 510.
Green *vs.* Green, 126 Mo., 17.
Haynes *vs.* McDermott, 91 N. Y., 451.
White *vs.* White, 82 Cali., 427.
Bond *vs.* Bond, 2d Lee, 45.

Rose *vs.* Clark, 8 Paige, 574.
Cartwright *vs.* McGrove, 121 Ill., 388.
6 Eng. Encl. Rep., 28.
Physick's Estate, 2 Brewst., 179.
Jones *vs.* Jones, 45 Md., 144.
Gall *vs.* Gall, 114 N. Y., 109.
Yates *vs.* Huston, 3 Tex., 433.
Bonds *vs.* Foster, 36 Tex., 58.
North *vs.* North, 1 Barb. Ch., 241.
Badger *vs.* Badger, 88 N. Y., 546.

VII.

While the trust in this case, reposed in the bank by Dr. Kerfoot, was fully executed by the bank, and neither Dr. Kerfoot, were he alive, his heirs, administrators, or other persons, he being dead, can question the right of the bank to receive and execute such trust, yet if such trust were to this day unexecuted and it was held that said bank had no authority to receive said conveyance and could not be compelled to execute the trust, this would avail plaintiff nothing, because a court of equity would appoint a competent trustee to execute the same; but the trust, as we have said, having been fully executed in the exact manner designated by Dr. Kerfoot, his heirs, or any one claiming under him, cannot question it.

Perry on Trusts, § 45, 4th ed.

We respectfully request this Honorable Court to consider the briefs of defendant in error, which were filed with the record in the Supreme Court of Missouri.

Respectfully submitted,

T. J. BEALL.

Appended hereto is defendants' argument in the Supreme Court of Missouri.

APPENDIX.

IN THE SUPREME COURT OF MISSOURI, DIVISION No. 2.

No. 8191.

HOMER HALL, *Administrator of the Estate of J. H. Kerfoot, Deceased, and* ROBERT EARL KERFOOT, *by Next Friend,* HOMER HALL,

vs.

THE FARMERS' AND MERCHANTS' BANK, THE FIRST NATIONAL BANK OF TRENTON, MISSOURI; THOMAS J. BEALL, and J. H. PATTON, *Curator to and for Hervey Kerfoot, Alwilda Kerfoot, Lester K. Kerfoot, and Mona Kerfoot.*

ARGUMENT.

The contention of appellant is, that the deed from James H. Kerfoot to the defendant, First National Bank, which recites a consideration of $1,400, with covenants of seizen and full warranty of title, conveyed no interest in the property in controversy, for the reason that the bank had no authority to accept it. The proposition asserted by appellants is not sustained by any of the authorities cited in their brief. On the contrary, the doctrine is well settled that banks, both State and national, have power to deal in real estate for certain purposes, and that if a bank accept deeds and mortgages even under circumstances such as would make the acts clearly *ultra vires*, or in violation of its charter; although the Government could object; still the deed or mortgage would be good between the parties. In Morse on Banks and Banking, vol. 1, p. 75 (3d edition), the rule

is thus stated: "If a national bank takes real estate by mortgage, trust deed, or conveyance absolute, no one but the United States can object; the transaction is perfectly good and enforceable between the parties." In Perry on Trusts, par. 45, the author says: "If a corporation take land by grant, which by its charter it cannot hold, its title is good against third persons and strangers; the State can only interfere." In the Union National Bank of St. Louis *vs.* Matthews, the Supreme Court of the United States, say: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object." In the case of Ragan *vs.* McElroy, it was held by the Supreme Court of Missouri, that where the grantee in a deed is a corporation, and the deed contains covenants of warranty, binding the grantor and his heirs, neither he nor they can afterwards deny the grantee's corporate existence, or its capacity to take and hold the land conveyed, as against those claiming under the deed (98 Mo., 349). To the same effect are many other authorities cited in appellee's brief.

It is also claimed by appellant, that the deed was never in fact accepted by the bank, although the record shows, indisputably, that the deed was received by the cashier of the bank and under direction of the grantor duly acknowledged and recorded at his expense. In Devlin on Deeds, p. 269, it is stated that possession of the deed by the grantee raises the presumption that the deed has been delivered and accepted. And the Supreme Court of Missouri has repeatedly decided that the record of a deed is sufficient to vest title (Caldwell *vs.* Head, 17 Mo., 561.) And in case of a minor grantee the possession of the father is sufficient.

The deed to the bank having been delivered and accepted, as shown by the undisputed evidence in the record, and reciting a valuable consideration, appellee contends that parol testimony is not admissible to defeat its operation, as a deed, nor to raise a resulting trust in the grantor. In

Tiedeman on Real Property, § 500, it is said: "As between grantor and grantee or their privies, want of consideration cannot be proved against the recitals in a deed to defeat it." And in Missouri, the doctrine is clearly settled, that a deed which recites a valuable consideration, cannot be so construed as to raise a resulting trust in the grantor. Bob *vs.* Bob, 89 Mo., 419; Weiss *vs.* Heitkamp, 127 Mo., 23; Standiford *vs.* Standiford, 97 Mo., 231.

In the last case cited the court held that where the father, the grantor in a deed to his minor son, said to a third party to whom he delivered it, "take the deed and file it for record," and the party kept the deed, and had it recorded after the death of the father, it was an absolute delivery of the deed for the benefit of the son, consummated as of the date of the first delivery by filing it for record.

The last contention of appellant is that the deed from the bank to the minor children of Dr. J. H. Kerfoot is void for want of delivery, and it is earnestly insisted that the facts in this case do not constitute a legal delivery of said deed, under the rule laid down by the Supreme Court in the case of Standiford *vs.* Standiford, cited *supra*. Let us see what grounds there are for such assumption? It is held in that case: "That when a deed to a minor is absolute in form and beneficial in effect and the father, the grantor, voluntarily causes the same to be recorded, acceptance of the grantee will be presumed, and such facts constitute *prima facie* a delivery, and afford reasonable presumption that the grantor intended to part with the title, and clear proof should be made that a person, under such circumstances, who has executed, acknowledged and caused a deed to be recorded did not intend to part with his title." Now what are the undisputed facts shown in the record, manifesting the intention of James Kerfoot to part with his title in this property, and vest it in his minor children, the grantees in said deed? It appears that at the time he conveyed the property to the bank, he enclosed this deed to his chil-

dren, with directions to the bank to execute the same and return it to him by mail. It is true, he says, that he would not have the deed recorded *at present*, and that should he ever wish to sell the property he would return the deed and have another made; but the very purpose of making the deed to his children is manifest from the statement in his letter of the 9th of October, written but a few days prior to the execution of the deed to the bank. It was made "to the relatives whom he wished to have it in case of his death by accident or otherwise."

It was made to his children to whom he referred in terms of endearment when speaking of the deeds in the letter to his wife. "I shall feel so good when they are fixed and no one can bother anything I have given my precious little darlings." And again in a subsequent letter, when referring to the very deed now in question, he says: "I have sent deed to Cook, and when deed comes back to children, I will deposit all with Stanton, or Davis, Beall & Kemp. So if anything happens to me they will have it." What more conclusive evidence to show that it was Dr. Kerfoot's intention to vest the title to this property in his children? And in addition to this documentary evidence, we have the undisputed testimony of the witness, T. J. Beall, whose depositions were taken by appellant, that this deed was delivered to him, among others, for the grantees, by Dr. Kerfoot, with instructions to send it on for record, which was subsequently done. Under these facts and circumstances attending the execution of the deed, which is "absolute in form and beneficial in effect," executed, acknowledged and recorded by the direction of Dr. Kerfoot, where is there a *scintilla* of evidence that he did not intend to part with his title? It is true he stated that if he ever sold the property, the deed to these children was to be returned to him by the bank, and another deed was to be made to parties as directed by him. But this was never done, and while living, and but a short time before his death, he delivered the deed to

the witness, Beall, for the children, and in the last reference made by him to the deed (when told the delivery was sufficient), he expressed himself as satisfied. It is true that the property was leased to the bank at the date of the original deed, and that the rents were credited to Dr. Kerfoot's account; but as the parent and natural guardian of his children, this would in no wise affect the validity of his deed. This very point was decided in the case of Rhea *vs.* Bagley, 63 Ark., 374, in which it was held: "That where certain lots were purchased and paid for by the father, and the deed made to his two sons by his request, the acceptance of the deed by the father was a sufficient delivery, the conveyance being beneficial to them. And that thereafter the minor grantees had a legal right to the rents and profits of the property conveyed." (Citing Tiedeman, Real Property, 814; Thornton on Gifts, §§174-175; 2 Jones Real Property, § 1270.) But aside from the fact of receiving the rents, there is absolutely no proof that Dr. Kerfoot ever intimated by word or deed, any intention other than is expressed in the terms of the deed. And this deed prepared by him and executed to the children by the bank, in the *habendum et tenendum* clause uses this emphatic language: "To have and to hold the same, with all the rights privileges and appurtenances thereto belonging, unto the said parties of the second part, and their heirs and assigns forever; so that neither the said parties of the first part, nor its heirs, nor any other person or persons, for it, or in its name or behalf, shall, or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they, and every of them, shall by these presents be excluded and forever barred." And this deed is executed upon the consideration, recited therein, of $1,400, the receipt of which is acknowledged. In view of this accumulation of evidence manifesting unmistakably and clearly the intention of Dr. Kerfoot to provide for his infant children by the execution of these deeds, we deem it altogether unnecessary to reply

at length to the assault made upon them in appellant's brief, in which they are designated as the illicit offspring of adulterous intercourse. If this were true, it would be wholly impertinent and immaterial to the issues involved in this case. Since, to use the language of the Supreme Court of the United States, in the case of Conley *vs.* Nailor: "It is not now open to question that a deed made by a father for the benefit of his illegitimate children is upon good consideration which will support the conveyance." (U. S. Book 30, L. C. P. Ed., p. 127, and cases cited.) While we do not justify or extenuate the sins of Dr. Kerfoot against the sanctity of the marriage relation, yet we feel that these beneficiaries of his bounty, are entirely innocent of any wrong. And no more should they be charged with the sins of their father, than should the alleged son of Robert Kerfoot be blamed for the transgressions of his mother, whereby he is shown to be the product of illicit intercourse, or not the son of his reputed father. The record shows that Robert Earl Kerfoot was born just five months and ten days after his mother, Mrs. Wells, formerly Mrs. Shade, was married to Robert Kerfoot. It is not surprising, therefore, that Dr. Kerfoot never recognized the clandestine marriage of his son to Mrs. Shade, nor that his son separated from her after the untimely birth of Robert Earl, and forever refused to acknowledge his marital relation or live with her again. And passing strange, it would be, if Dr. Kerfoot should have bestowed the fruit of his toil and economy upon this stranger to his heart and home, and especially, in view of the threatened arrest of his son by his alleged wife, which caused his tragical death.

We have referred to these unfortunate circumstances and relations which environ this case, to show that in the declining years of Dr. Kerfoot's life, it was but right that he should make ample provision for these children, the dearest objects of his love and solicitude, and bound to him by the strongest ties of nature and affection. The statement made

by appellant in the conclusion of his argument, that the estate of Dr. Kerfoot conveyed to the three illegitimate children is worth $75,000 to $100,000, is grossly excessive and not supported by the record. While the testimony is too indefinite to make an accurate estimate, we believe its value will not exceed the sum of $40,000, not "all of which, in various ways, has been conveyed to these defendants and their attorneys," as represented in appellant's argument. If however, all of this is true, and more, we reply that the law fixes no limit to the amount and value of property which may be conveyed by deed; nor the extent and value of a gift. It may extend to the whole of the grantor's estate. (Page *vs.* Lewis, Book 18, Law, Ann. Rep., 179; 1 White & T. Lead. Cas. Eq., pt. 2, p. 1251). And when the record speaks in every line of the solicitude, and avowed and unwavering purpose of Dr. Kerfoot to bestow upon these children, through the solemnities of a deed, the property acquired by him through a long life of thrift, frugality and industry, we can not believe this Honorable Court will annul the deeds of conveyance, and devolve all of the property by the statute of distributions upon strangers to his house and home.

BEALL & KEMP AND
HARBER & KNIGHT,
Attorneys for Defendants.

KERFOOT *v.* FARMERS' AND MERCHANTS' BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 6. Argued October 25, 1910.—Decided November 7, 1910.

In the absence of clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable. The sovereign alone can object; the conveyance cannot be impugned by the grantor, his heirs or third parties.

Although the conveyance of real estate in this case to a national bank was not one permitted by § 5137, Rev. Stat., title to the property passed to the grantee for the purposes expressed in the conveyance and that instrument cannot be attacked as void by an heir of the grantor.

On writ of error to review the judgment of a state court holding that a deed to a national bank was not void under the Federal statute, this court will not review findings of the state court of fact as to the acceptance of the deed.

THE facts, which involve the validity of a transfer of real estate to a national bank, are stated in the opinion.

Mr. Homer Hall and *Mr. Frank Hall*, with whom *Mr. George Hall* was on the brief, for plaintiff in error:

The national banking act is an enabling act, and a national bank cannot exercise any powers except those expressly granted by that act or such incidental powers as are necessary to carry on the business of banking. *First Nat. Bank* v. *Converse*, 200 U. S. 425; *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *California Nat. Bank* v. *Kennedy*, 167 U. S. 363; *First Nat. Bank* v. *Hawkins*, 174 U. S. 363; *Pacific R. R. Co.* v. *Seely*, 45 Missouri, 212.

The only power or authority for a national bank to

acquire or hold real estate is given by § 5137, Rev. Stat., under which it has no power or authority to accept or hold the real estate for the purpose for which it was attempted to be conveyed in this case. The effort to convey the real estate in question being beyond the powers given to the bank to accept and hold the same, the proceedings, therefore, were an absolute nullity; there was no acceptance of the deed by it, and no title vested in it. See cases *supra* and *Pittsburg & Cinn. Ry. Co.* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Merchants' Nat. Bank* v. *Wehrmann*, 202 U. S. 295; *First Nat. Bank* v. *Am. Nat. Bank*, 173 Missouri, 153, 159; *Marble Co.* v. *Harvey*, 92 Tennessee, 115; *Steele* v. *Fraternal Tribunes*, 215 Illinois, 190; *Ellett-Kendall Shoe Co.* v. *Western Stone Co.*, 112 S. W. Rep. 4; *Anglo-Amer. Land Co.* v. *Lombard*, 132 Fed. Rep. 721, 737; *Brown* v. *Needles' Nat. Bank*, 94 Fed. Rep. 925; *Coleman* v. *San Rafael Road Co.*, 49 California, 517; *Pacific Ry. Co.* v. *Seely*, 45 Missouri, 212.

The making of the deed and sending it to the cashier of the defendant national bank being absolutely void, the same can be taken advantage of by any person whose interests are involved. *National Bank* v. *Matthews*, 98 U. S. 621; *Union Gold Mining Co.* v. *National Bank*, 96 U. S. 640, have no application to the facts in this case. These and the cases of *National Bank* v. *Whitney*, 103 U. S. 99; *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451, and similar cases, relate to the taking of real estate security for loans made by national banks.

This is not a question as to the power of a national bank to loan money on real estate security. It involves an entirely different principle which is clearly distinguishable. *California Nat. Bank* v. *Kennedy*, 167 U. S. 363; *McCormick* v. *Market National Bank*, 165 U. S. 538.

Plaintiff in error is neither a third person in law nor a stranger to the transaction, but is a privy of the maker of the deed both in blood and in estate. *Stacy* v. *Thrasher*

6 How. (U. S.) 44; *Subway Co.* v. *St. Louis*, 145 Missouri, 551, 567.

The transaction being *ultra vires* and void for want of authority in the defendant national bank, and of its cashier, to accept the deed or title to the property, either party to the transaction can avail himself of this want of authority.

Plaintiff contends that said state court erred in deciding and holding that the cashier of the defendant bank had the authority to accept said deed from the original maker thereof.

If the cashier had authority to accept the deed for the bank, it was by his general authority in his ordinary business as cashier, otherwise no title vested in the bank and the transaction was a nullity. *United States* v. *City Bank of Columbia*, 21 How. 356, 366; *Bank of United States* v. *Dunn*, 6 Pet. 51; *Western Nat. Bank* v. *Armstrong*, 152 U. S. 346; *Norton* v. *Derby Nat. Bank*, 61 N. H. 589; *Bank of Commerce* v. *Hart*, 37 Nebraska, 197; *Bank of Healdsburg* v. *Bailhache*, 65 California, 329.

The fact that no loss resulted from this particular transaction affords no jurisdiction or excuse for the illegal and unauthorized act. There could be no end to the loss or injury that might result from such a precedent.

The accepting of this deed was not one of the incidental powers necessary to carry on the business of banking, nor was it accepted as a security for a past indebtedness or purchased under judgment in favor of the bank. Neither was it for the purpose of owning a banking house of its own for, as heretofore stated, the bank continued to pay rent as a tenant to the grantor, and the cashier and vice-president immediately after receiving the deed attempted to convey the property away.

There is no evidence that the defendant bank, its officers, except its vice president and cashier, or its board of directors ever knew of this attempted conveyance,

much less ratified the same. There could have been no ratification of the same. The act was unauthorized and beyond its powers, illegal and void, and was incapable of ratification. See cases *supra; Western Nat. Bank* v. *Armstrong*, 152 U. S. 346.

The attempted conveyance of the property by Kerfoot to the bank and the acceptance of the deed by the cashier of the bank being *ultra vires* no title to the property passed from Kerfoot or vested in the bank, because the bank not only did not, but could not accept, the deed or the title to the property. There was neither a delivery nor an acceptance of the deed. *Hall* v. *Hall*, 107 Missouri, 101; *Miller* v. *McCall*, 208 Missouri, 562, 580; *Armstrong* v. *Morrill*, 14 Wall. 120.

Mr. T. J. Beall for defendants in error:

This court will not review the findings of fact made in the state court as to consideration for the deed. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Quimby* v. *Boyd*, 128 U. S. 489.

If a corporation take land by grant which by its charter it cannot hold its title is good against third persons, and the State only can interfere. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240; *De Fritts* v. *Parker*, 132 U. S. 282. See also *Smith* v. *Shelley*, 12 Wall. 358, 361; *Myers* v. *Croft*, 13 Wall. 295; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439; *Reynolds* v. *Crawfordsville National Bank*, 112 U. S. 405; *Scott* v. *DeWeese*, 181 U. S. 202.

The cases cited by plaintiff in error are inapplicable to the issues involved in this case, and are clearly differentiated in principle.

The original maker of the deed if living, could not question the power or authority of the bank to receive the deed made by him to it, nor the authority of the bank

to act thereunder, and plaintiff in error stands in no more favorable position in regard to this matter. *French* v. *Spencer*, 21 How. 97; *Broadwell* v. *Merritt*, 87 Missouri, 95; *Wherry* v. *Hale*, 77 Missouri, 20; *Insurance Co.* v. *Smith*, 117 Missouri, 261–289; *Weiss* v. *Heitkamp*. 127 Missouri, 23; *Henderson* v. *Henderson*, 13 Missouri, 107; *Reinhardt* v. *Lead Mining Co.*, 107 Missouri, 616; *Reynolds* v. *Bank*, 112 U. S. 495; *Bank* v. *Flathers*, 45 L. R. A. 75; *Bond* v. *Tennell Mfg. Co.*, 82 Texas, 310; Herman on Estoppel, § 573, p. 577; 1 Morse on Banking, 3d ed., § 75; Perry on Trusts, 4th ed., § 45; *Bob* v. *Bob*, 89 Missouri, 411; 7 Amer. & Eng. Ency. of Law, 29.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought in 1894, in the Circuit Court of Grundy County, State of Missouri, to set aside a deed of real property made by James H. Kerfoot to the First National Bank of Trenton, Missouri, and also a deed by which that bank purported to convey the same property to the defendants Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and for the recovery of possession. The plaintiffs in the action, which was brought shortly after the death of James H. Kerfoot, were Homer Hall, administrator of his estate, and Robert Earl Kerfoot, his infant grandson, who claimed to be his only heir at law and sued by Homer Hall as next friend. The petition contained two counts, one in equity, the other in ejectment. Upon the trial the Circuit Court found the issues for defendants and the judgment in their favor was affirmed by the Supreme Court of Missouri. 145 Missouri, 418. On his coming of age Robert Earl Kerfoot sued out this writ of error.

The plaintiff in error challenges the conveyance made by James H. Kerfoot to the bank, upon the ground that under § 5137 of the Revised Statutes of the United States,

relating to national banks, the bank was without power to take the property, and hence that no title passed by the deed, but that it remained in the grantor and descended to the plaintiff in error as his heir at law. It appears that the deed, which was absolute in form, with warranty and expressing a substantial consideration, was executed in pursuance of an arrangement by which the title to the property was to be held in trust to be conveyed upon the direction of the grantor; and the Supreme Court of Missouri decided that a trust was in fact declared by the grantor in favor of Hervey, Alwilda and Lester R. Kerfoot, to whom ran a quitclaim deed, which he prepared and forwarded to the bank to be signed and acknowledged by it and then returned to him.

But while the purpose of this transaction was not one of those described in the statute for which a national bank may purchase and hold real estate, it does not follow that the deed was a nullity and that it failed to convey title to the property.

In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. *Smith* v. *Sheeley*, 12 Wall. 358; *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Fritts* v. *Palmer*, 132 U. S. 282; *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.) 313. Thus, although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings

by the Government for exercising powers not conferred by law. *National Bank* v. *Matthews, supra; National Bank* v. *Whitney, supra; Swope* v. *Leffingwell,* 105 U. S. 3.

In *National Bank* v. *Matthews, supra,* viewing that case in this aspect, the court said:

"The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

* * * * * * * *

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas,* 7 Serg. & R. (Pa.) 313; *Goundie* v. *Northampton Water Co.,* 7 Pa. St. 233; *Runyon* v. *Coster,* 14 Pet. 122; *The Banks* v. *Poitiaux,* 3 Rand. (Va.) 136; *McIndoe* v. *The City of St. Louis,* 10 Missouri, 575, 577. See also *Gold Mining Co.* v. *National Bank,* 96 U. S. 640."

This rule, while recognizing the authority of the Government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared and this trust should not be permitted to fail and the property

to be diverted from those for whom it was intended, by treating the conveyance to the bank as a nullity, in the absence of a clear statement of legislative intent that it should be so regarded.

The cases in this court, which are relied upon by the plaintiff in error, are not applicable to the facts here presented and are in no way inconsistent with the doctrine to which we have referred. *McCormick* v. *Market Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364.

It was also urged by the plaintiff in error that the deed was not accepted by the bank, and was inoperative for that reason. The Supreme Court of Missouri held upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86; *Egan* v. *Hart*, 165 U. S. 188; *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220.

Assuming that the deed was accepted by the bank, it was effective to pass the legal title, and the plaintiff in error as heir at law of the grantor cannot question it.

Judgment affirmed.